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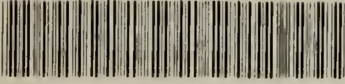

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1996/97 Massachusetts Criminal Procedure, Statutory, & MV Update for Police Officers

Massachusetts Criminal Justice Training Council

In-service training 1997

Executive Director—Howard Lebowitz
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"a comprehensive overview of Massachusetts Criminal Procedure and MV Law for police officers including statutory and case decision updates for 1996 and 1997"

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Student Handout

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INTRO: The Foundation of Police Criminal Procedure in the Commonwealth of Massachusetts—*by Patrick M. Rogers, esq.*

Introduction to the Foundation

The legal foundation of any police intrusion requires an understanding of the concept of a ***reasonable expectation of privacy.*** If a person has a reasonable expectation of privacy in an area or object, then any police intrusion into that area or object must be reasonable. The standard of reasonableness will depend on whether the police are conducting a stop, a stop and frisk, or whether they are conducting an evidentiary search. Depending on the type of police intrusion, the standard of evidence required will be either reasonable suspicion or probable cause.

A reasonable expectation of privacy will depend on:

(1) whether the individual has exhibited an actual (subjective) expectation of privacy—whether the individual has shown that he seeks to preserve something as private, ***and***
(2) whether the individual's subjective expectation of privacy is one that society is prepared to accept as "reasonable"—whether the individual's expectation, viewed objectively, is justifiable under the circumstances

The Court, in determining whether a defendant's expectation of privacy is one which society could recognize as reasonable, will examine:

(a) the place of the search
(b) the property searched
(c) the precautions taken by the defendant to maintain his privacy

Three Types of Police Intrusion

Once it is ascertained that the defendant has a reasonable expectation of privacy in the area or object subject to the police intrusion, an analysis must be made concerning the type of police intrusion. There are three types of police intrusions that must be remembered:

1) stops/seizures or investigative detentions [these terms are interchangeable with one another; they also mean that a seizure has taken place for constitutional purposes]
2) frisks or cursory pat downs [these terms are interchangeable with one another; they also mean that a search has taken place for constitutional purposes]
3) evidentiary searches

Legal Standards Police Must Use [reasonable suspicion and probable cause]

■Reasonable Suspicion
Reasonable suspicion is the legal standard that must exist if police are conducting either of the following:

a) seizing a person for investigative purposes
b) frisking a person reasonably suspected of being armed and dangerous

■Probable Cause
Probable cause is the legal standard that must exist if police are conducting either of the following:

a) an arrest of a person
b) a seizure of any evidentiary item that does not fall within the category of a weapon or an object that can be construed as such

Editor's Note: As you read this entire document it will be important to recall this analysis. It can be used in any police situation involving an intrusion into an area where there exists a reasonable expectation of privacy.

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The Stop or Investigative Detention [permissible based on reasonable suspicion]

This type of police intrusion is permissible on the standard of reasonable suspicion. Probable cause is not required. If a police officer has reasonable suspicion based on specific and articulable facts to believe that the suspect has, is, or os about to commit a crime, he or she will be empowered to conduct a stop or investigative detention. This standard of information will not ordinarily, in this circumstance, additionally permit police to conduct a frisk. See below.

Frisks or Cursory Pat Downs [permissible based on reasonable suspicion]

This type of police intrusion is also permissible on the standard of reasonable suspicion. Probable cause is not required. If a police officer has reasonable suspicion based on specific and articulable facts to believe that the suspect is unlawfully armed and dangerous, he or she may conduct a pat frisk. The scope of the frisk is strictly limited to weapons or objects that can be used as such. It is important to understand that everyone subjected to a stop is not ordinarily going to be subjected to a frisk. A person stopped for going through a yield sign cannot automatically be subjected to a frisk. Additionally, if police detain an elderly person on reasonable suspicion that he has committed the offense of shoplifting, a frisk can only be performed if, in addition to the justification for the stop, police have additional reasonable suspicion that the shoplifting suspect is unlawfully armed and dangerous. Without this additional information, a pat frisk would be unlawful.

Frisk Must Be For Weapons or Objects Used as Such

The object of the cursory pat down can only be weapons or objects that can be used as such under circumstances where the investigating officer has reasonable suspicion that the individual possessing them is a danger. A frisk on reasonable suspicion cannot be legally supported if it is conducted specifically for items or objects that cannot pose a threat to the officer. That type of frisk would require probable cause.

Did a Seizure Actually Take Place?

This is often a confusing area to law enforcement practitioners. Just because a police officer has a conversation with an individual does not mean that a stop or investigative detention has occurred. Remember, a seizure requires reasonable suspicion. If the officer did not "seize" the subject, then no reasonable suspicion is required. If a police officer simply calls out to a subject walking down the street and engages him or her in conversation, no seizure has occurred. As long as the subject is free to walk away, no constitutional infringement will trigger.—and, as stated earlier, no reasonable suspicion, or any standard of evidentiary justification will be required.

Editor's Note: In other words, police will be free to engage persons in conversation without any legal justification at all. If the person decides to walk away and the officer detains him, even momentarily, the standard of reasonable suspicion must exist. If not, then a constitutional violation has occurred and any evidence discovered as a result will be suppressed.

Evidentiary Search [permissible based on probable cause only]

The above two types of police intrusions are permissible using the standard of reasonable suspicion. This is so because a stop is of brief duration, usually taking place in public and that the object of a frisk is to make sure the suspect cannot access a weapon to assault the police officer or others in the immediate area. The standard of probable cause would be too rigorous for law enforcement to have to meet in these instances. On the other hand, whenever police undertake an evidentiary search of an area or object in which the suspect has a reasonable expectation of privacy, the standard of probable cause is required. Without probable cause, the evidence will be suppressed.

Editor's Note: As an example, if police stop and frisk a suspected drug dealer on reasonable suspicion, a search of a small soft bag discovered inside of a jacket pocket would not be legal. Since a soft bag could not be a weapon, it could not be searched on the standard of reasonable suspicion. It could only be entered by the police if they have probable cause. The type of police intrusion in this instance would not be a weapons frisk, it would be evidentiary in nature, therefore, probable cause would be required.

Frisk-Search Requires Probable Cause

If police frisk a person for evidence that could not conceivably be a dangerous weapon, then the standard of probable

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cause must exist to support that frisk-search. The following example is based on the recent case of **Commonwealth v. Alvarado**, 420 Mass. 542 (1995).

Editor's Example: Police conduct a stop of a motor vehicle for a red light violation. At the request of the investigating officer, the operator alights from his vehicle. The operator is then observed placing a small soft brown paper bag into his shirt pocket causing it to create a small bulge. The officer then places his hand on the outer shirt pocket and "pats" the small bulge. Is this permissible? Since there is obviously a reasonable expectation of privacy in the person's shirt, what standard of reasonableness is required to legally support this type of police intrusion? This type of intrusion is clearly a "search" for purposes of constitutional analysis. Additionally, the type of police intrusion here is clearly evidentiary. There is no indication whatsoever that the small soft brown paper bag is either a weapon or that it could conceal a weapon. Therefore, this type of police intrusion, although only a frisk, can only be supported by full probable cause. See **Commonwealth v. Alvarado**, 420 Mass. 542 (1995).

Evidentiary Search; Once Probable Cause Exists—Police Require Either a Warrant, Consent, or Exigent Circumstances—the Three Cornerstones

If police are to conduct an evidentiary search, the standard of probable cause is required. Once police have the requisite probable cause, they then require either a warrant, consent, or exigent circumstances to further justify the intrusion.

Example: Police observe through a living room window that a dwelling house has a large six foot marijuana plant. This obviously creates probable cause. However, does this automatically allow police to seize the plant? What type of police intrusion would it require? Since there is a reasonable expectation of privacy in a dwelling, a certain standard must be met by the police. Would it be reasonable suspicion or probable cause? Since the intrusion would be for evidence, probable cause would be required. Once probable cause has been attained, then police need either a warrant, consent or exigent circumstances to seize the plant. It is also important to understand in this particular example that probable cause to believe that a dwelling house simply contains contraband does not amount to exigent circumstances. There must be a reasonable fear of destruction of the evidence. Therefore, without a reasonable fear of evidence destruction, police must either obtain a warrant or have consent.

Example: On a cold night, undercover police observe a man selling marijuana on a street corner. After conducting a brief surveillance, police additionally observe that the suspect is keeping the stash inside of his large winter jacket. Police walk over to this individual, identify themselves, and conduct a search of his jacket pockets. They discovery a number of one ounce bags of marijuana secreted inside his jacket pockets along with a $500.00 bill. What type of police intrusion was effected? Since there is obviously a reasonable expectation of privacy in the person himself, a certain standard must be met by the police. Would it be reasonable suspicion or probable cause? Since the intrusion is for evidence, probable cause would be required. In this example, police clearly had probable cause based on their first hand observations. Once probable cause exists, then police additionally need to be operating under one of three banners discussed above, either with a warrant, consent, or exigent circumstances, to lawfully search for and seize the evidence. In this example, the search and seizure of the evidence would be permissible because the circumstances would be exigent. See **Commonwealth v. Skea**, 18 Mass. App. Ct. 685 (1984).

Example: Police have a surveillance set up in an area notorious for drug trafficking. The area has also been the scene of recent shootings involving narcotics. They observe an unknown male standing in this area simply having a conversation with a female. The female is known to the police as having an arrest record for trafficking in Class B and unlawful possession of a firearm. Police walk over to this male to make an inquiry as to his presence in the area under the circumstances. Police then order this male to "get up against the wall," so they may conduct a pat-frisk. Inside of his zippered jacket pocket, police feel a very soft object consistent with being a small paper bag. They unzipper the pocket and remove the paper bag. Inside of the bag police discover a small amount of cocaine. What type of police intrusion is this? Is it for weapons or for evidence? Since the bag could not be a weapon or an object that could be used as such, the search of the bag could only be evidentiary in nature. What standard is then required? Answer—probable cause. Did the police, in this fact pattern, have probable cause to conduct a search and seizure of this male for evidence? Answer—No. Although a pat and frisk may have been justifiable under the circumstances, the police clearly did not have probable cause to believe that the male possessed any incriminating evidence on his person. The scope of the pat-frisk conducted by the police would not extend into the paper bag because it could not reasonably be construed as a weapon or of holding a weapon. The cocaine would be suppressed. See **Commonwealth v. Clermy**, 421 Mass. 325 (1995).

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1997 Criminal Procedure

Stop and Frisk: When Does the Stop Start?

The Stop Starts When the Pursuit Begins

Recently, in **Commonwealth v. Stoute**, 422 Mass. 982 (1996), the Massachusetts Supreme Judicial Court formally announced that for purposes of article 14 of the Massachusetts Declaration of Rights, a police officer must have reasonable suspicion to justify a pursuit. If not, any evidence obtained as a result of it must be suppressed.

Example: While on routine cruiser patrol,two police officers observe a male standing on a street corner late at night. The subject looks up at the police and starts to walk away from the approaching cruiser. The cruiser pulls off to the side of the roadway. The two officers then exit the cruiser and continue to monitor the subject. The subject, still peering back at the police officers, starts to walk faster. The officers start to walk in the direction of the subject. The male subject then starts to walk faster. The police officers also start to walk a bit faster toward the subject. The subject now breaks into a sprint pace down the sidewalk away from the police officers. Both police officers then start to pursue him. After a short foot pursuit, the subject is caught. A frisk of his person reveals a loaded firearm.

Question: Assuming that he is unlicensed to carry in the Commonwealth, is the evidence seized by the police admissible against the subject?

Answer: No. Since police conducted a pursuit without any reasonable suspicion, the seized evidence will be inadmissible in light of the recent decision of **Commonwealth v. Stoute**, 422 Mass. 982 (1996).

Reasonable Suspicion Required Prior to the Initiation of the Pursuit

Because of the decision of **Commonwealth v. Stoute**, 422 Mass. 982 (1996), *before* police intiate a pursuit of a subject, they must be able to point to specific and articulable facts for legal justification to support the chase.

Following Subject From a Police Cruiser

In **Commonwealth v. Williams**, 422 Mass. 111 (1996), the Massachusetts Supreme Judicial Court stated that where police observe a person running and they decide to following them in a cruiser to merely observe them, "[no] degree of suspicion, reasonable or otherwise, [is] constitutionally required for the police to commence surveillance."

Sources of Reasonable Suspicion of Criminal Activity

These are the most common sources for reasonable suspicion of criminal activity. They may be helpful for police officers to cite "specific and articulable" facts in their offense reports to help justify a stop and frisk **Terry**-type situation:

1. admissions and confessions
2. real and physical evidence observed
3. person's prior criminal record or reputation
4. furtive gestures or flight
5. knowledge that a crime has been committed
6. visible apprehension at the sight of police officers
7. attempts to avoid contact with the police
8. evasive answers, conflicting stories, refusal to answer
9. area known for criminal activity
10. association with known criminals
11. individual matches description of "wanted" suspect
12. suspicious presence at a late hour in unusual location
13. proximity to the crime scene
14. special training or knowledge of the officer
15. lack of "fit" between suspect and neighborhood
16. time of the day or night
17. immediately verifiable info from an informant
18. activity inappropriate in its setting
19. traffic violations

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The Police Encounter

Field Interrogation Observation (FIO)Procedures Not a Seizure

In **Commonwealth v. Thinh Van Cao**, 419 Mass. 383 (1995), the defendant in an armed robbery case was identified by an earlier photograph taken by police during a **Field Interrogation Observation** procedure. Under that procedure, the police question suspicious looking males concerning gang membership. Police simply ask them their identity and their dates of birth. Police make note of their physical descriptions and then take a Polaroid photograph of the suspect after receiving permission. The defendant attempted to suppress the photographic identification of him from a photograph taken from an impermissible police seizure in violation of the Fourth Amendment and article 14 of the Massachusetts Declaration of Rights. The SJC held that since these police actions do not amount to a seizure, no constitutional violation occurred.

In **Commonwealth v. Thinh Van Cao**, 419 Mass. 383 (1995), the photograph from which the victim identified the defendant [Cao] was taken by a Boston police detective pursuant to a police department policy requiring police in Chinatown to conduct **Field Interrogation Observations (FIO)** of young men they suspect may be involved with Asian gangs. Under this **FIO** procedure, the police question suspicious looking Asian males asking them to identify themselves, to give their date of birth and a physical description (including height, weight and tatoos), and to take their photograph with a Polaroid camera. During an **FIO**, the individuals approached by the police officers are free to go and to refuse having their picture taken. The police did not give Cao any reason to believe that he was not free to go, and they asked his permission before taking the picture. Under the totality of the circumstances, a reasonable person would have believed that he was free to leave and to refuse to be photographed. Therefore, the defendant's constitutional rights were not violated.

Editor's Note: Boston police Detective Waiman Lee testified that while on foot patrol in Chinatown, he conducted an **FIO** of the defendant[Cao] and three of his friends, all youths. Lee testified that he conducts **FIOs** when he suspects someone of being a member of an Asian gang. Lee, dressed in full uniform, approached the group as they were walking together in a parking lot and asked them several questions including their names, dates of birth, addresses, and physical descriptions. Lee testified that the youths stopped when he approached them and answered the questions. After he asked the questions Lee performed an outstanding warrant check on the youths. The process of questioning and checking for warrants took no more than 5 minutes. Lee testified that after he had checked for warrants, Detective John Bean came on the scene. At Lee's request, Bean retrieved a Polaroid camera from his car. When Bean returned with the camera he asked the youths, including the defendant, "you don't mind if we take a picture of you, right?," to which the defendant replied, "No, I didn't do anything wrong, go ahead." Lee testified that at no time during these few minutes did the detectives indicate to the group that they were not free to leave. The defendant spoke with his friends during the encounter and appeared to be under no physical distress nor did he indicate that he wanted to leave.

Editor's Note: The Massachusetts Supreme Judicial Court stated that "[a]ll of the information given was recorded by Lee on a small notecard as was his normal practice when conducting FIOs. There was no evidence that Lee ordered the group to answer his questions or otherwise indicated that they could not terminate the encounter. The FIO was conducted in public, while the defendant was walking with friends in a parking lot, not while the defendant was in a confined space or in a car. Lee testified that during the encounter the defendant spoke with his friends and did not appear to be under any physical distress nor did he indicate at any time that he wished to leave. Under these circumstances, we cannot say that a reasonable person would have been sufficiently intimidated so as to feel that he or she could not terminate the encounter and walk away. Therefore, there was no seizure." Lastly, in**Terry v. Ohio**, 392 U.S. 1 (1968), the United States Supreme Court noted that "street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life."

Field Interrogation Observations (FIO) Targeting Specific Racial Groups

In Commonwealth v. Thinh Van Cao, 419 Mass. 383 (1995), the defendant argued that race was used as a determinative factor in who the officers conducting FIOs in Chinatown targeted and sought to suppress the **FIO** photograph under the exclusionary rule on the grounds that the **FIO** policy was a "formula for absolute tyranny." On the issue of discrimination, the Massachusetts Supreme Judicial Court stated that "the proper remedy for the defendant's concerns is not the exclusionary rule." **Terry v. Ohio,** 392 U.S. 1, 13-15 (1967) (recognizing that although FIO procedures are a source of conflict between minority youth and police officers, the exclusionary rule is not an effective method of discouraging considerations of race in police work).

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Written Policy Guidelines Should Be Promulgated by Departments Concerning FIOs

In **Commonwealth v. Thinh Van Cao**, 419 Mass. 383 (1995), the Massachusetts Supreme Judicial Court stated that "[w]e suggest that the better practice would be for officers conducting FIOs to inform the individuals approached that the encounter is consensual and that they are free to leave at any time. We also suggest that the police department develop clear guidelines for the application of the FIO procedure so that officers are given guidance as to the permissible scope of such encounters."

Stop and Frisk: The "Frisk-Search"

Frisk of Bulge Containing Plastic Glassine Bag Requires Probable Cause—The "Frisk-Search"

In **Commonwealth v. Alvarado**, 420 Mass. 542 (1995), police effected a stop of the defendant as he was traveling in his motor vehicle on Route 495 with a passenger. Police stopped this vehicle based "on the peculiar maneuverings of the automobile and the extremely slow speed at which it was traveling." After the vehicle stopped, the officer approached the driver's side and instructed the operator to drive off the highway into a nearby rest area. While speaking to the operator, the officer shone his flashlight into the interior and observed the passenger grasping an object in a closed fist while attempting to place it down the front of his pants. The object appeared to be a clear plastic glassine bag commonly used in the drug trade. Once in the rest area, the officer approached the passenger's side and instructed the passenger to step from the vehicle. The officer then asked him what he had placed down the front of his pants. He denied placing anything into his pants. The officer then requested a license from the operator. Additionally, he asked the operator for his social security number. The operator could not recall it. The officer then again asked the passenger what he placed into his pants. The passenger stated, "Nothing," and without any instruction from the officer, assumed a "spread eagle" position against the suspect vehicle. The officer then patted the front of the passenger's pants and felt a bulge. Since the officer had earlier observed that the item placed down the front of the defendant's pants was a small plastic bag, a frisk of that area would not be permissible for weapons or objects that could be used as such. The police intrusion here could only qualify as evidentiary in nature. Since a "pat frisk" is a search for constitutional analysis, the SJC stated that for the "pat frisk" of the bulge to be permissible in this case, probable cause was required.

Editor's Note: The SJC held that the officer's observation of the glassine bag during the initial stop combined with the passenger placing the bag into the front of his pants did not rise to the level of probable cause to arrest or search the passenger.

Stop and Frisk: A Division of Doctrines

High Crime Rate Area Alone Not Enough to Effect a Stop

The fact that there has been criminal activity in the area or that it is a high crime area may justify a brief threshold inquiry along with other factors. But the fact, standing alone, that the defendant was in a neighborhood frequented by drug users is not a basis for concluding that the defendant himself was engaged in criminal conduct and therefore, a threshold inquiry was not warranted. **Brown v. Texas**, 443 U.S. 47 (1979). In **Commonwealth v. Wooden**, 13 Mass. App. Ct. 417 (1982), the Court held that a gesture of stuffing something into one's pocket, *by itself*, did not justify the stop.

Editor's Note: In **Commonwealth v. Cheek**, 413 Mass. 492 (1992), the Court stated that just because police stop someone in a "high crime area" will not be persuasive. That factor contributes nothing to the police officers' ability to distinguish defendants from any other. Where there is a report of a crime in a neighborhood which police consider to be a "high crime area," law enforcement officials may not conduct a broad sweep of that neighborhood stopping individuals who happen to live in the area and be about, hoping to apprehend a suspect. To permit police investigative stops in this manner would be to encourage unduly intrusive police practices. The problems that may face a particular area of the community or any other similar "high crime area" will not be resolved any more readily by excluding the individuals who live there from the protections afforded by our Constitution.

Race and Jacket Match Not Enough to Effect Stop

In **Commonwealth v. Cheek**, 413 Mass. 492 (1992), Boston police officers at approximately 11:20 P.M., received

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the following bulletin over their police radio:

> **"16 Ruthven Street, the second floor, stab victim stabbed to the back supposed to be conscious. "For a suspect we have a black male with a black 3/4 length goose known as Angelo of the Humboldt group. We'll get further info later."**

Following receipt of the bulletin, the officers began to search the Grove Hall area of Boston for a suspect in the stabbing. Subsequently, the officers observed a black male (the defendant) walking on a street approximately one-half mile from the scene of the reported stabbing. The defendant was wearing a dark-colored three-quarter length goose-down jacket. The police officers then effected a stop of the defendant, and asked him his name, to which he responded "Zan" or "Ann." His response was not clear to the officers because he had his coat zippered up over his mouth. The defendant's hands were in his coat pocket. A second officer frisked the defendant and retrieved a .38 caliber handgun from his front coat pocket. Police then placed the defendant under arrest after he failed to produce a license to carry the gun. A subsequent booking search of the defendant revealed seventeen plastic bags of marijuana.

> **Editor's Note:** The SJC held that these factors could not have provided the officers with reasonable suspicion that the defendant was the perpetrator of the reported stabbing. Significantly, the description of the suspect as a "black male with a black 3/4 length goose" could have fit a large number of men who reside in the Grove Hall section of Roxbury, a predominantly black neighborhood of the city. The officers possessed no additional physical description of the suspect that would have distinguished the defendant from any other black male in the area such as the suspect's height and weight, whether he had facial hair, unique markings on his face or clothes, or other identifying characteristics. **That the jacket matched was not enough to single him out.** Moreover, the Commonwealth presented no evidence to establish that a "3/4 length goose" jacket, the sole distinctive physical characteristic of the garment, was somehow unusual or, at least, uncommon as an outer garment worn on a cold fall night. Although the officers properly may consider that the defendant was one-half mile from the scene of the reported stabbing, taken together with the other facts in this case, it was not enough to support a reasonable suspicion. That the defendant was walking in a residential area before midnight one-half mile from the scene of the crime does not make up for the lack of detail in the radio description, as it did not help to single him out from any other black male in the area. There was no evidence that the defendant had been fleeing the scene of the crime or that he, or any other person, was engaged in any suspected criminal activity.

Close Proximity to Crime Scene Coupled With Furtive Movements Justification for Frisk

In **Commonwealth v. Mercado**, 422 Mass. 367 (1996), police received a dispatch concerning gunfire involving three "Hispanic males." When the police arrived at the scene, they observed the victim bleeding profusly. A witness then told police that he had observed some unusual activity at a shoe store nearby The witness stated that he observed a shirtless Hispanic or black male wearing olive green pants pushing people out of his way in an apparent attempt to reach the cash register. He had three or four fifty dollar bills in his hands and said that he wanted to buy an article. The man appeared very agitated. The officer then observed an Hispanic male come out of a vestibule and then go back in. The office then observed a second Hispanic male make these same movements. The defendant was wearing plaid pants with a long Miami Hurricane shirt extending over the top, and a baseball cap. The officer patted him down and discovered a 9mm. in his waistband. The Court held that the officer had reasonable suspicion to conduct a stop and frisk under the circumstances. The report narrowed the range of possible suspects to males of Hispaic decent who were in the particular vicinity of the incident. Additionally, a witness further narrowed the range of suspects to males of Hispanic decent. then present in the area of the store. That information, coupled with the furtive behavior of the defendant and his companion was sufficient for the officer to form a reasonably suspicion to effect a stop and frisk under the circumstances. The seizure of the weapon was permissible.

Difference Between Cheek and Mercado

In this case, unlike**Commonwealth v. Check**, 413 Mass. 492 (1992), the information in possession of the officer allowed him to distinguish the defendant and his companion from all other persons in the vicinity.

Running Down Street at Sprint Pace

In **Commonwealth v. Williams**, 422 Mass. 111 (1996), police observed two black males running at "sprint pace" down Washington street in Boston. The officers observed that bystanders were turning and pointing at them. One of the officers observed the defendant pull a white shirt over his head and discard it. Police also noticed that this man was sweating and

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had a strained expression on his face. A bystander then walked over to the officers and gave them a beeper and told them that one of the running males dropped it. The officers then followed these running males with the police cruiser. The defendant then ran behind a house. The officers exited their cruiser to investigate. They then observed that the defendant was covered with blood. The defendant then attempted to scale a chain link fence. One of the officers ordered the defendant to stop. The officer unholstered his weapon and followed the defendant who fled behind another house. The officer ordered him to the ground at gunpoint. The defendant then stated that he had been shot, but police did not observe any wounds. While handcuffing the defendant, the officers received a radio broadcast reporting a confirmed shooting in the immediate area. The description aired over the radio mathced the individual now in custody. The Court held that the police had reasonable suspicion to conduct a stop and frisk of the subject under the circumstances.

Circumstantial Proof of Unlawful Carrying

In **Commonwealth v. Williams,** 422 Mass. 111 (1996), the defendant was observed by witnesses fleeing from a building immediately after shots were fired. The witnesses stated and later testified that they observed the defendant carrying a gun. However, when the defendant was apprehended, no gun was discovered. The Court stated that "the jury could properly consider eyewitness testimony that the defendant had a firearm in his possession, even in the absence of the recovery of such a firearm." Additionally, the Court stated that "[i]t is sufficient that a gun was fired and the defendant was seen fleeing the scene within seconds of the gunshots. A conviction may be properly based entirely on circumstantial evidence so long as the evidence establishes the defendant's guilt beyond a reasonable doubt."

Editor's Note: Another interesting case concerning circumstantial proof is **Commonwealth v. Dawson,** 399 Mass. 465 (1987). In **Dawson,** a case concerning controlled substances, the SJC stated that "[p]roof that a substance is a particular drug need not be made by chemical analysis and may be made by circumstantial evidence." Nor is the testimony of a qualified chemist required. Additionally, the SJC stated that "the great weight of authority in this country permits [] an experienced user of a controlled substance to testify that a substance that he ***saw and used*** was a particular drug." Lastly, they stated that "[w]e suspect it would be a rare case in which a witness's statement that a particular substance ***looked*** like a controlled substance would ***alone*** be sufficient to support a conviction."

Stop and Frisk: Simultaneous Discovery of Evidence During Frisk

Contraband Simultaneously Uncovered During Frisk for Weapons Permissible

In **Commonwealth v. Johnson,** 413 Mass. 598 (1992), the SJC upheld a frisk which produced a plastic bag containing a lump of white powder from the defendant's pants after he was seen attempting to hide something there. In **Johnson,** police operating an unmarked police cruiser were almost hit by an individual operating his motor vehicle at a high rate of speed. After a high speed chase, the defendant was subsequently forced off the road by police. As the police officers ran toward the defendant's vehicle, they saw the defendant placing something inside the waistband of his pants. The defendant was then ordered at gunpoint to "freeze," and was subsequently pulled from his automobile. A police officer then discovered inside of the defendant's pants a plastic bag containing a lump of white powder and six small paper folds. A police officer is not going to be held to the standard of whether he was able to ascertain, under threatening circumstances, whether a bulge or container was a weapon or not. "[I]t was necessary for the protection of [the officer] and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized." Given the circumstances faced by the officers in this case, they were warranted for their own protection in finding out what the defendant had concealed inside his pants. Police officers are not required to gamble with their personal safety. ***Any contraband or other evidence of a crime discovered during a lawful frisk will be admissible under the doctrine of plain view.***

Editor's Note: The SJC permitted the police to enter the defendant's pants as a frisk under the circumstances to *seize* the items being secreted "to discover the true facts and neutralize the threat of harm if it materialized." Once the bag was removed from the defendant's pants the cocaine was observed by the police officers in plain view. The SJC is not going to require the police to make split second legal tactical decisions concerning the dangerousness of an object or container concealed on the body of a suspect under the circumstances. On the other hand, if the police were unable to see into the plastic bag after they seized it from the defendant's groin, coupled with the fact that it was incapable of being a weapon or holding a weapon, further inspection of the plastic bag could not be justified without probable cause.

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Contraband Simultaneously Uncovered During Frisk for Weapons of Jacket Taken From Suspect

In **Commonwealth v. Rivera**, 33 Mass. App. Ct. 311 (1992), Marlborough police pulled over a motor vehicle for a speeding violation. When the officer turned on his dome lights to effect the stop, he observed the passenger of the motor vehicle look back at the police cruiser and then bend forward as if he were putting something on the floor. There were two additional passengers in the back seat. Subsequent to the stop, the operator told the officer that he did not have his license with him. The officer then observed an aluminum baseball bat sticking out from the seat between the passenger's legs. Remembering that only two weeks earlier a police officer in Lawrence had been beaten to death with an aluminum baseball bat during a routine traffic stop, the officer became concerned for his safety and called for a backup. The officer conducted a pat frisk of the front passenger. Finding nothing suggesting a weapon, the officer conducted a frisk of a passenger seated in the rear. This passenger was clutching a "boombox" in his lap. Although he was told to place both of his hands on the trunk of the vehicle, he kept taking one of his hands off the trunk and grabbed at his jacket. The officer then conducted a frisk of this passenger and felt what he thought was a weapon in his jacket. Because the officer was unable to locate the suspected weapon in any pocket, he removed the jacket from the passenger and placed it on the bumper of the police cruiser. By this time, the backup officer arrived. That officer then searched the jacket and found a buck knife and a large number of packets containing heroin between the lining and the outer shell of the jacket. The Court held that the frisk was permissible under the circumstances, and, additionally, upheld the seizure of the heroin packets from the defendant's jacket since they were discovered in the course of a lawful frisk for weapons.

Conducting a Seizure Based on an Anonymous Tipster

Editor's Note: This area continues to cause a great deal of confusion with police officers due to the complexity of establishing reasonableness from an anonymous informant or anonymous tipster. Therefore, I am repeating this particular topic in the in-service materials for 1997 together with additional cases to assist police officers with this difficult area. In **Commonwealth v. Lyons**, 409 Mass. 16 (1990), the Massachusetts Supreme Judicial Court held that when police act pursuant to an anonymous tip, the standard of reasonable suspicion will be measured against whether there is any indicia of reliability and basis of the tipster's knowledge. It is the establishment of these prongs, often under circumstances requiring an immediate response, which creates uncertainty with police officers and causes frustration when they later ascertain through a motion to suppress that what they did mandated suppression.

Lack of Informant's Reliability and Basis of Knowledge

In **Commonwealth v. Lyons**, 409 Mass. 16 (1990), police received an anonymous telephone call stating that two white males, one of whom was named Wayne, had just purchased narcotics in Chelsea and would be heading for Bridgton, Maine. The caller stated that they would be driving in a silver Hyundai automobile with Maine registration 440-44T. A police surveillance was then set up. Approximately 45 minutes after the call, police observed the auto. Police stopped the vehicle. The operator was Wayne Lyons. The identity of the operator was learned **after** the stop. Police then observed cocaine in plain view and both occupants were subsequently arrested. ***The evidence was ordered suppressed.***

The Massachusetts Supreme Judicial Court held that the Commonwealth shall adhere to a reasonable suspicion standard using both **reliability** and the **basis of knowledge** as factors in assessing an informant's information when it leads police into conducting a stop or a stop and frisk.

Applying this approach to the facts in Lyons, the Court stated that:

> "the police ***did not have*** sufficient articulable facts for the investigatory stop. The tip provided no information regarding either the basis of the informant's knowledge or his reliability. Furthermore, the quantity and quality of the details corroborated by the police were simply insufficient to establish any degree of suspicion that could be deemed reasonable. The police officer was able to verify only the description of the automoble, the direction in which it was headed, and the race and gender of the occupants before making the stop. These details do not reveal any special familiarity with the defendant's affairs that might substitute for explicit information about the basis of the caller's knowledge. Indeed another driver equipped with a car telephone could have provided the same details. Likewise, the informant's reliability was only slightly enhanced by this corroboration because the police verified no predictive details that were not easily obtainable by an uninformed bystander. The corroboration went only to obvious details. [T]hese defendants displayed no suspicious behavior that might have heightened police concern."

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Editor's Note: If police ran the registration plate prior to the stop and discovered that the owner's name was Wayne, this information would go toward establishing the reliability of the caller. Additionally, if the caller had imparted future predictive details concerning a particular exit ramp the vehicle eventually turned off of, this would also go to establishing the reliability prong. The basis of knowledge prong can be satisfied where the facts indicate that the tipster observed the evidence.

Anonymous Tip Concerning the Carrying a Concealed Weapon Not Reasonable Suspicion

In **Commonwealth v. Alverado**, (1996), an anonymous caller to police reported seeing "several Hispanic subjects" in a blue automobile in the driveway of "138 Jackson street." The anonymous caller further reported to the police that he or she saw a gun inside the vehicle and that it was wrapped in a towel. When police arrived at 138 Jackson street, they immediately observed a blue vehicle with six Hispanic or Black people sitting in it. The car was starting to back out of the driveway. The police officer parked his cruiser directly behind the suspect vehicle and turned on his dome lights. Police told the operator that they were investigating a complaint concerning a firearm located in a blue car. The defendant-operator replied that he did not have a firearm in the car and invited the police to search the vehicle. Police then discovered a .22 caliber firearm wrapped in a towel located in the glove compartment. The operator was then arrested for unlawfully carrying a firearm.

The question presented in **Alverado** was whether the presence of a handgun wrapped in a towel provides any reasonable basis for suspecting the occurrence of past, present, or future criminal activity. Carrying a firearm without a license (or other authorization) is a crime punishable by c. 269, § 10 (a). The Massachusetts Supreme Judicial Court held in **Commonwealth v. Couture**, 407 Mass. 178 (1990), that, under the Fourth Amendment, "[t]he mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun."

Editor's Note: The Massachusetts Supreme Judicial Court stated that "carrying a weapon concealed in a towel, a bag, or a knapsack, for example, however, is not a crime in this State. The suspected crime in such circumstances can only be the carrying of an unlicensed weapon, ***because carrying a concealed weapon is not, standing alone, an indication that criminal conduct has occurred or is contemplated.***"

Satisfaction of Basis of Knowledge But Lack of Reliability Insufficient to Trigger Reasonable Suspicion

In **Commonwealth v. Alverado**, (1996), the information from the anonymous informant would warrant a reasonable suspicion that the defendant had committed, was committing, or was going to commit a crime ***only if the informant's tip were shown to be reliable.*** Reliability of an anonymous tip must be based on the informant's reliability and on a demonstration of the basis of the informant's knowledge. The basis of the informant's knowledge appeared within the tip itself, in which the caller stated that he or she had ***seen*** several "Hispanic subjects" in a blue car in the driveway at 138 Jackson Street and had seen a handgun wrapped in a towel in the vehicle. However, the information regarding the location and description of the vehicle did not establish the informant's reliability because they amounted to innocent details.

Editor's Note: In **Commonwealth v. Alverado**, (1996), the Court stated that "these facts are less persuasive than the facts in **Commonwealth v. Lyons**, 409 Mass. 16 (1990), in which this court held that information in an informant's tip was not sufficiently corroborated to warrant an investigatory stop. In the **Lyons** case, the State police received an anonymous telephone call stating that two white males had just purchased narcotics in Chelsea and would be heading for Bridgton, Maine, in a silver Hyundai automobile with a Maine registration 440-44T. Less than one hour later, a State trooper saw the vehicle, occupied by two white males, and stopped it. He saw in the vehicle what appeared to be cocaine and drug-related items. This court held that the evidence seized should be suppressed because neither the basis of the informant's knowledge nor his reliability were established by the tip and such details as were corroborated by the police. The police confirmed the detailed description of the vehicle, the direction in which it was headed, and the race and sex of its occupants. The court concluded that: "the informant's reliability was only slightly enhanced by this corroboration because the police verified no predictive details that were not easily obtainable by an uninformed bystander. The corroboration went only to obvious details, not nonobvious details. Significantly, these defendants displayed no suspicious behavior that might have heightened police concern. Anyone can telephone the police for any reason. Thus, some specificity of nonobvious facts which show familiarity with the suspect or specific facts which predict behavior is central to reasonable suspicion. By using objective criteria, the risk of arbitrary action and abusive practices by police is diminished."

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Editor's Note: In **Commonwealth v. Alverado**, (1996), the Court stated that "there was no suggestion of threats of violence, acts of violence, impending criminal activity, or concern for public safety. Our cases have not yet declared reasonable suspicion warranted simply on a report of gun possession just because this country has problems with the unlawful use of guns." The Massachusetts Supreme Judicial Court concluded that reasonable suspicion justifying an investigatory stop cannot be gounded on an anonymous tip concerning a concealed weapon made by a person whose reliability is not established where there is no indication (in the tip or otherwise) of a threat to anyone's physical well being ***or*** of the commission of a crime (other than the possibility of the possession of an unlicensed weapon).

Failure to Establish Basis and Reliability of the Information

Recently, in **Commonwealth v. Cheek**, 413 Mass. 492 (1992), police were in search of a stabbing suspect. The police officers received the following information over their police radio : "[f]or a suspect we have a black male with a black 3/4 length goose jacket—known as Angelo of the Humblt group. We'll get further info later." Following receipt of this bulletin, police observed a black male one-half mile from the scene of the reported stabbing. He was wearing a dark-colored three-quarter length goose-down jacket. The police conducted a stop of the defendant and asked him his name, to which he gave an unclear response. He had his coat zippered up over his mouth. The defendant's hands were in his coat pockets. Police frisked the defendant and retrieved a .38 caliber handgun. Since the defendant did not have a license to carry, he was promptly arrested. Was the stop lawful? Did police have enough "reasonable suspicion" to support their actions in effecting the stop and the ensuing frisk? [**Editor's Note:** This sought of information is dispatched to police officers nightly. Officers act on this level of information in many many instances. Is it legal? No.] The Court held that the stop was unlawful. They stated that there was no evidence as to the source of the information on which the radio call was based. The police officers did not possess sufficient and articulable facts to establish a reasonable suspicion that the defendant had committed the crime. That the jacket matched was not enough to single him out.

[**Editor's Note:** Police dispatchers must be trained to obtain as much information as possible from anonymous callers. Descriptions and whereabouts often are not enough. Predictive details will always be helpful to police. This should be made commonplace to all police dispatchers.]

Police Reliance on Radio Broadcast From Headquarters

Where the police rely on a police radio broadcast from headquarters to conduct an investigative detention, the Commonwealth must present evidence to establish its indicia of reliability. Therefore, if the defendant's attorney files a motion to suppress the stop, the prosecution must present evidence at the hearing on the suppression motion on the factual basis for the police radio broadcast in order to establish its reliability. See **Commonwealth v. Cheek**, 413 Mass. 492 (1992).

Police Reliance on Computer Communique From Another Police Agency

In **Commonwealth v. Willis**, 415 Mass. 814 (1993), the Flint, Michigan police sent a teletype communication to the Boston police department. It was based on information furnished to the Flint, Michigan police department by an undisclosed informant. The substance of the communication was that Marco Willis, a black male, five feet ten inches tall, with short hair, last seen wearing a blue jean jacket and pants and black tennis shoes, should be on a Greyhound bus arriving in Boston at approximately 6:50 P.M. He should be carrying a blue and white pillowcase with stripes and no other luggage. Willis was said to be armed with a thirty-eight caliber handgun, taken from his grandfather's house, along with five live rounds. The communication purported to give the gun's serial number and the name of the person to whom the gun was registered. It asked that, if Willis were apprehended, the weapon be confiscated and the Flint police advised. At 4 P.M. that same day, Sergeant Richard Famolare of the Boston police telephoned the Flint police department to verify the information. The officer who had sent the teletype message had gone home for the day. Famolare obtained no further information from Flint. At roll call that afternoon, Famolare learned that Officer William Reynolds had arrested Willis in 1991 for armed robbery. In addition, Reynolds had arrested Willis twice for outstanding default warrants. Famolare, Reynolds, and two other officers went to the Greyhound bus terminal in plain clothes but with their badges visible. When Willis got off the bus carrying a striped pillowcase, Famolare and two officers, *with their guns drawn*, followed Willis. Reynolds went through the bus terminal and confronted Willis from the opposite direction in a driveway down which Willis was walking. No other people were in the driveway. Reynolds, with his gun out and his badge visible, called, "Marco, police, take your hand out of your right pocket." Willis looked at Reynolds and then looked back at the other officers. He removed his hand from his pocket and raised his hands. One of the officers pushed Willis's arms all the way up above his head, and Famolare removed a gun from Willis's pants. Willis volunteered that he had taken the gun for his own protection.

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Editor's Note: Before the stop imposed by the Boston police department can be lawful, police must first satisfy the two-pronged test created in **Commonwealth v. Lyons**, 409 Mass. 16 (1990). Independent police corroboration may make up for deficiencies in one or both of these factors.

The SJC held that the police properly conducted a stop and frisk of the defendant. The SJC stated that the teletype message itself went a long way toward showing the informant's **basis of knowledge** by providing detail concerning the pillowcase, the serial number of the gun, the name of the registered owner, and the fact that the gun was taken from the house of the defendant's grandfather. When the defendant, known to the Boston police, got off the bus, *as predicted in the teletype message,* carrying a distinctively striped pillowcase, the information sent from Michigan was significantly corroborated, particularly, and rather conclusively, as to the soundness of the informant's basis of knowledge. Although the teletype message told nothing about the **credibility** of the informant or about the **reliability** of the information, the corroboration of portions of the teletype information by the police who met the bus makes a sufficient but "less rigorous showing" that the information was reliable and thus warranted a reasonable suspicion that the defendant was carrying a stolen gun which might be loaded.

Police Broadcast of "Man Waving a Gun" Not Justifying a Protective Frisk

In **Commonwealth v. Berment**, 39 Mass. App. Ct. 522 (1995), the Court held that a police dispatch of a "man waving a gun," based on an anonymous caller, did not justify a protective frisk of the defendant. At approximately 3 a.m., a police officer on cruiser patrol received a dispatch about "a man waving a gun" at 11 Mount Pleasant Avenue in the Roxbury section of Boston. The radio call did not include the identity of the caller, nor did the call include a description of the man who was "waving the gun." The only detail given was the address of the alleged activity. When the police arrived at 11 Mount Pleasant Avenue, they saw, in an adjacent lot, three men, one woman, and a motor vehicle. One of the men was sitting in the vehicle on the passenger side. The others were standing around the vehicle. The officer did not see any criminal activity. There was no shouting or threats, and no one tried to run upon the arrival of the officer. The four individual were just talking. No one was waving a gun. The officer was familiar with the area. He had made a total of six arrests for drug offenses, none for guns. The officer then forcibly detained the defendant and conducted a pat frisk. The frisk revealed a handgun and live ammunition. The Court suppressed the evidence. The Court stated that "where the police rely on a radio call to conduct an investigatory stop, the Commonwealth must present evidence at the hearing on the motion to suppress on the factual basis for the police radio call to establish its indicia of reliability. There was no evidence regarding the identity of the caller, the circumstances of the call, or the identity or description of the "man waving a gun." The fact that four people were gathered around a motor vehicle at three o'clock in the morning "just talking" does not point to criminal activity.

Training Police Dispatchers Handling Calls from Anonymous Persons

Often police dispatch will receive a call from someone who wants to report a crime but who also wants to remain anonymous. It is important then for the police dispatcher to receive as much information as possible from the caller. Recently, the Courts in Massachusetts have been requiring police to measure the information that they have received from anonymous callers up against a "two pronged test" of reasonable suspicion. This new standard was created by the Massachusetts Supreme Judicial Court in **Commonwealth v. Lyons**, 409 Mass 16 (1990). This test is made up of the reliability of the caller **and** of the basis of knowledge of the caller. In **Lyons**, the Court stated that whenever police effect a stop of a person **or** a motor vehicle, it must be based on both the reliability and the basis of the caller's knowledge. If either one of these prongs is lacking, independent police corroboration may be used as a substitute. Consider the following:

Let's say that a Fall River police dispatcher receives a call from someone desiring to remain anonymous. The caller states that a red 1996 Jaguar is operating east on route 6, Mass. Reg—123456 and that it contains a large amount of cocaine inside the passenger compartment. The caller further states that "they're on their way to New Bedford to score." At this point what amount of information do the Fall River Police Department have? Suppose a surveillance is set up and the suspect vehicle is observed about 30 minutes later—do police have enough to effect a stop of this vehicle? According to the Lyons decision, a seizure of this vehicle would not be lawful. Why? Let's look at the facts. The only information that the Fall River Police Department received is that an unidentified person stated that a particular motor vehicle contains contraband. This amount of information will not justify a stop of either a motor vehicle or of a person. Remember what the Court stated in **Lyons**, that someone with a car phone could have made such a call. Information of this quality is broadcasted to police cruisers by police dispatchers all the time. What is required then? Perhaps police dispatchers could extract additional information from the caller relative to [more precisely] where the vehicle [or person] is going. If the caller is able to provide where the vehicle [or person] is going, that information itself would satisfy both the basis of knowledge prong and the reliability prong in

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that the caller must have had an inside track of what's going on. In addition, by being able to predict where the vehicle [or person] is headed, it not only lends a personal basis to the caller's knowledge, it also demonstrates a high degree of reliability of the truthfulness of what was originally told to the police dispatcher. [Of course, the direction of a vehicle alone would not be enough to verify that the caller knew where the vehicle would be headed—what would be required is perhaps a moving surveillance to see if the vehicle in fact stopped in the city of New Bedford.] Without information of this sought, the Court will hold such a stop unlawful, in much the same way as the Court did in **Lyons**.

Proportionality of Force During Terry Frisk

Handcuffing a "Terry" Suspect is Not Automatically an Arrest

In **Commonwealth v. Pandolfino**, 33 Mass. App. Ct. 96 (1992), review denied 413 Mass. 1106 (1992), the Massachusetts Appellate Court stated that handcuffing of a defendant will not automatically trigger a de facto arrest. In **Pandolfino**, the defendant was suspected of carjacking. Another Massachusetts case is **Commonwealth v. Andrews**, 34 Mass. App. Ct. 324 (1993), where the Massachusetts Appellate Court stated that the handcuffing of an armed robbery suspect out of concern for police safety did not require probable cause. As long as the police were operating within the orbit of "reasonable suspicion" their actions would be justified under the circumstances.

Handcuffing Occupants of MV and Ordering Them to the Ground on Reasonable Suspicion

Recently, in **Commonwealth v. Varnum**, 39 Mass. App. Ct. 571 (1995), the Court permitted police to handcuff three occupants of a motor vehicle and order them to the ground at gunpoint where police had reasonable suspicion that they were involved in a burglary and that the vehicle might contain stolen property including a shotgun. In Varnum, there was a passage of only a few hours between the reported crime and the stop. The Court stated that "[r]easonable precautions in effecting a Terry stop may include using handcuffs and forcing a defendant to lie on the ground." The actions of the police did not convert the circumstances into an arrest.

Permissibility of Taking Photographs and Fingerprints During Terry Stop

In **Hayes v. Florida**, 105 S.Ct. 1643 (1985), the United States Supreme Court held that where police officers initiate a stop of an individual based on specific and articulable facts that he was the perpetrator of a rape, photographs and fingerprints may be taken to further the police investigation, as long as the process is undertaken by the police with reasonable dispatch. Such investigatory measures do not violate the Fourth Amendment. *Probable cause or a warrant is not required.* Other personal characteristics routinely exposed which may be "seized" include a voice exemplar under **United States v. Dionisio**, 410 U.S. 1 (1973), a handwriting exemplar under **United States v. Mara**, 410 U.S. 19 (1973), and footsole impressions under **United States v. Ferri**, 778 F.2d 985 (3rd. Cir. 1985).

Terry Stop Based on a "Wanted Poster"—Police Issued Bulletin

In **United States v. Hensley**, 469 U.S. 221 (1985), the Supreme Court addressed the question whether a police officer or police department may make a **Terry** stop in reliance on a "wanted flyer" issued by a neighboring police agency indicating that the defendant was suspected of a crime. The Court upheld the stop provided that "the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop." This requirement is equally applicable where information is transmitted between officers by radio rather than by a wanted flyer.

Length of the Investigative Detention; How Long is Too Long?

The United States Supreme Court and the Massachusetts Supreme Court have never ruled definitively on this subject. Each set of facts must be examined on a case-by-case basis. In **United States v. Sharpe**, 407 U.S. 675 (1985), the Court stated that there is no fixed time allowed and that it depends upon the purpose to be served by the stop and the time reasonably needed to carry it out. In deciding the permissible duration of a **Terry** investigative detention, *the court will look to the following issues:*

(a) the diligence with which the police pursue the investigation
(b) does the police investigative detention confirm or dispel their suspicions, and
(c) to what extent the suspect's actions contribute to any unnecessary delay

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The following cases will be instructive when determining the proper length of an investigative detention:

(a) **United States v. Richards**, 500 F.2d 1050 (9th Cir. 1974), where a one hour detention was reasonable where the suspects offered implausible explanations of their activity which agents attempted to verify
(b) **United States v. Hardy**, 855 F.2d 753 (11th Cir. 1988), where fifty minutes had past while police secured a drug sniffing dog [in **Hardy**, the police could not have anticipated the use of the drug sniffing dog]
(c) **United States v. Quinn**, 815 F.2d 153 (1st Cir. 1987), where twenty to twenty-five minutes elapsed while police acted diligently to confirm their suspicions
(d) **State v. Foster**, 535 A.2d 393 (Conn.App.Ct. 1988), where one full hour elapsed while police sought to locate the owner of a burglarized vehicle at 4:50 a.m.
(e) **Commonwealth v. Tosi**, 14 Mass.App.Ct. 1029 (1982), where twenty to thirty minutes elapsed while a license and registration check culminated into a showup identification for stolen property
(f) **Commonwealth v. Sanderson**, 393 Mass. 761 (1986), where forty minutes detention to await the arrival of drug sniffing dog was unreasonable.
(g) **United States v. Sharpe**, 407 U.S. 675 (1985), where the suspect and his vehicle were detained for 20 minutes while the police conducted an investigation concerning marijuana transportation

The Nonseizure Field Investigation

Conducting a "Pat-Frisk" Without Cause to Initiate a Stop

In **Commonwealth v. Fraser**, 410 Mass. 541 (1991), the Massachusetts Supreme Judicial Court held that [in some cases] police are lawfully entitled to conduct a "pat-frisk" of a person where the circumstances ***do not give rise to a lawful stop.*** Confused? The **Fraser** decision is a difficult case to fully understand at first. Please read this and the following section very slowly. I am incorporating much of the actual language used by the Court in their analysis. [This case was decided under Fourth Amendment principles because the defendant's attorney did not separately argue under Article 14 of the Massachusetts Declaration of Rights which might have given him more protection].

> In **Fraser**, Boston police received a dispatch about "a man with a gun inside a brown Toyota at 35 High St. in Dorchester," which is located in a "high crime area." On arriving at the scene, the officer saw a group of young men standing on the sidewalk, the defendant among them, but no brown Toyota. As the officer was exiting his cruiser [officer Martin Columbo], he observed the defendant bend down behind a white pick-up truck "as though to pick something up or put something down." Officer Columbo walked up to the defendant and identified himself as a police officer, whereupon the defendant stood up with his hands in his coat pockets. Officer Columbo asked the defendant to remove his hands from his pockets. Columbo then immediately conducted a "pat-frisk" of the defendant and felt an object which turned out to be a loaded handgun. After ascertaining that the defendant did not have a proper license, he was placed under arrest.

In their analysis, the SJC stated that by merely approaching the defendant, identifying himself as a police officer, and asking the defendant to remove his hands from his pockets, ***did not convert the situation into a seizure under the Fourth Amendment*** [**Editor's Important Note:** Recall the section on **encounters**]. However, what about the pat-frisk? Is that a seizure? Does that not trigger the Fourth Amendment? The Court stated that it "plainly implicates the Fourth Amendment and must be justified by a showing that Officer Columbo reasonably believed that the defendant was armed and dangerous."

> **Editor's Note:** Where was the reasonable justification for the "stop?" Was there a "stop" at all in this case? There certainly was a "frisk." It is possible to conduct a "stop" without a "frisk," but how is it possible to conduct a "frisk" without a "stop.?"

The "Nonseizure Field Interrogation"

Editor's Note: The Massachusetts Supreme Judicial Court stated that **Fraser** is an anomalous case "in that the pat-down of the defendant was not proceeded by a forcible stop, the prototypical situation addressed in Terry. Officer Columbo simply patted down the defendant in the course of a ***nonseizure field interrogation.*** Therefore, we do not address the issue whether Officer Columbo had the requisite quantum of suspicion to justify a stop."

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Editor's Query: Would the **Miranda** warnings be required when conducting a nonseizure field interrogation? **Answer:** No. Why? Because the element of custody would be lacking.

Editor's Note: Additionally, the **Fraser** Court stated that "[t]his anomaly also provides a basis for distinguishing our recent decision in **Commonwealth v. Couture,** 407 Mass. 178 (1990)." Remember in **Couture** police received information that a man in a particular automobile possessed a firearm. Police observed the automobile and **pulled it over.** This was a forcible stop which **distinguishes** this case from **Fraser.**

In **Commonwealth v. Fraser,** 410 Mass. 541 (1991), the Court quoting *LaFave* stated that "a protective frisk of a suspect under the principles of **Terry** may be warranted ***where there is some legitimate basis for the officer being in immediate proximity to the person.*"** In addition, they stated that "[w]hile the justification for an officer's proximity to a suspect frequently is a **Terry** stop, a pat-down also may be permissible in other situations where the officer necessarily comes into contact with a person he considers dangerous. This is such a case." The Court further stated that "[o]fficer Columbo had a duty to investigate the report of an armed man at the location where the defendant was. Having received a report of an armed man, it would have been poor police work had the officer left the scene without making any inquiries. We conclude that the officer's proximity to the defendant was justified. Therefore, we ask only whether the pat-down was supported by a reasonable belief that the defendant was armed and dangerous even though we recognize that [] the officer may **not have had** sufficient information to justify an investigative stop under **Terry.**" **Editor's Note:** Would it be poor police work not to investigate the vehicle in **Couture**? How could they have investigated Couture without effecting an stop? What other police methods would be available to investigate Couture without effecting a forcible stop implicating the Fourth Amendment.

Also in the Fraser decision, the Court gave us four factors to justify the pat-down [and not the stop]:

(1) the radio call describing a man with a gun
(2) the fact that the encounter occurred in a "high crime area"
(3) the defendant's bending down behind the truck "as though to pick something up or put something down," and
(4) the fact that at all critical times the defendant kept his hands in his pockets

Totality Test for Protective Frisks: In weighing the above factors, the SJC took into account **"the totality of the circumstances**—the whole picture." **United States v. Cortez,** 449 U.S. 411, 417 (1981). Thus, a combination of factors that are each innocent of themselves may, when taken together, amount to the requisite reasonable belief.

Editor's Important Note: Recall the test required by the Court to conduct a stop under **Commonwealth v. Lyons,** 409 Mass. 16 (1990). In **Lyons,** the SJC required a showing of the informant's basis of knowledge and reliability before police could lawfully initiate a **stop [a.k.a. a forcible detention].** However, this **Frasier** decision is not requiring police to satisfy the two-prong test enunciated in **Lyons** before they can conduct the **pat-frisk [a.k.a. non-seizure field investigation],** but only a totality of the circumstances test.

The Radio Broadcast Alone Not Enough: In **United States v. Hensley,** 469 U.S. 221 (1985), the Supreme Court addressed the question whether an officer of a police department may make a **Terry** stop in reliance on a "wanted flyer" issued by a neighboring police department indicating that the defendant was suspected of robbery. The Court upheld such a stop provided, among other things, that ***"the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop."*** Of course, this requirement is equally applicable where information is transmitted between officers by radio rather than by a wanted flyer, and where the contested police conduct is a **protective frisk** ***rather than*** an **investigatory stop.** In the instant case, the record is barren of evidence indicating that the officer responsible for issuing the radio call had sufficient information to justify a **Terry**-type frisk, or indeed that he had any reliable information about the defendant at all. Therefore, we are constrained by **Hensley** to conclude that the radio broadcast did not, ***in and of itself,*** give Officer Columbo the reasonable suspicion required to conduct a protective frisk. The broadcast, therefore, falls in the category of a factor which taken alone would **not justify** the search, but which taken together with other factors **may constitute** reasonable suspicion.

However, the SJC concluded that, when all the facts are taken together, Officer Columbo had sufficient information to justify the **protective frisk** of the defendant. Officer Columbo was confronted with the following situation. In response to a radio bulletin reporting a man with a gun, the officer found a group of young men at an identical location, which he knew to be a **"high crime area."** The officers were outnumbered. Officer Columbo saw the defendant bend down behind a truck in a manner suggesting that he might be picking something up or putting something down, and then the defendant confronted

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the officer with his hands in his pockets. Taken together, these circumstances are enough to warrant belief by a "reasonably prudent man . . . that his safety or that of others was in danger."

Legal Analysis Used to Distinguish Between a Stop and a Pat-Frisk

Under **Commonwealth v. Lyons**, 409 Mass. 16 (1990), police must satisfy a two-prong test before they can conduct a stop. This test shall require police to make a showing of the informant's basis of knowledge and reliability. This standard is required whether or not police conduct a frisk of the subject after the stop. It is the fact that police make a stop that requires them to satisfy this standard. Remember, that a stop will also be categorized as a forcible detention or an investigative detention.

Under **Commonwealth v. Fraser**, 410 Mass. 541 (1991), police must only satisfy a totality test whenever they conduct a pat-frisk *without* a stop. This test is much more flexible test than that announced in **Commonwealth v. Lyons**, 409 Mass. 16 (1990). The flexibility is allowed due to the danger of the officers safety or that of others when confronted with such a situation.

The Law of Arrest Within the Commonwealth

Bringing the Arrestee to Court *[Jenkins' 24 hour Massachusetts rule]*

In **Jenkins v. Chief Justice of the District Court**, 416 Mass. 221 (1993), the Massachusetts Supreme Judicial Court held that whenever police effect a ***warrantless arrest*** of a subject, ***it must be followed by a judicial determination of probable cause within 24 hours of the arrest, including weekends and holidays.***

Jenkins Requires That Determination Be on Oath of Arresting Officer

This determination must also be based on an explicit "oath" or "affirmation" of the arresting officer.

> **Editor's Note:** This decision will have many far reaching ramifications for the criminal justice system here in the Commonwealth of Massachusetts and it should be thoroughly explored to see what mechanisms should be put in place by all police agencies within the Commonwealth to help insulate themselves from both motions to dismiss and motions to suppress evidence and from becoming targets of tort law liability for detaining a prisoner unlawfully.

SJC Refuses to Create Per Se Rule of Dismissal for Enforcement

In **Commonwealth v. Viverito**, 422 Mass. 228 (1996), the SJC refused to lay down a per se prophylactic rule to enforce the mandate of **Jenkins**. In **Viverito**, the SJC stated that "[a] violation of the rule in **Jenkins** [] is this same type of delay that may violate statutory or constitutional rights but has little to do with the evidence to be adduced at trial...."

Remedy of a Jenkins Violation

In **Commonwealth v. Viverito**, 422 Mass. 228 (1996), the SJC, stated that "[a] **Jenkins** violation certainly interferes with rights— but it is instead the general liberty interest in not being held in custody without probable cause. When this interest, wholly separate from the underlying charges, is impermissibly infringed, remedies and enforcement tools such as civil sanctions can protect the right without the adverse consequences of a dismissal with prejudice.

Probable Cause to Effect an Arrest

Probable Cause to Arrest While Possessing a "Baggie" in High Crime Area

In **Commonwealth v. Rivera**, 27 Mass.App.Ct. 41 (1989), police had probable cause to effectuate the arrest of the defendant when he was found in a place known to be of high incidence of drug trafficking and possessed a "baggie," [a container consistent with drug packaging], which he attempted to conceal in his trousers in an evasive reaction to his noticing the police officer's approach. In **Rivera**, there were four elements that established probable cause:

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(1) the defendant was in possession of what appeared to be evidence of a crime, "a baggie," reasonably identified as a type of container regularly used in illicit drug transactions
(2) the defendant reacted with behavior reasonably interpreted to be evasive or furtive
(3) the encounter was in a place of high incidence of drug traffic, and
(4) experienced investigators on the scene evaluated the event as indicating present criminal conduct on the part of the accused

Editor's Note: In **Rivera**, the Massachusetts Appellate Court stated that, "[i]t may be assumed that no one of these elements, standing alone, would suffice to establish probable cause for arrest and search." In footnote 3, the Court stated, "[in] the present case the container was capable of use for a lawful as well as an unlawful purpose; where a container appears to have but one use, and that an unlawful one, its identification, standing alone, may be enough to justify a seizure." See **Texas v. Brown**, 460 U.S. 730 (1983) (where the containers triggering probable cause were "tied-off, deflated balloons believed by the police to contain heroin.) Additionally, In **Commonwealth v. Benitez**, 37 Mass. App. Ct. 722 (1994), the Court stated that the concurrence of the first and second factors of **Rivera** [above] "readily cumulate to provide probable cause." But see **Commonwealth v. Alvarado**, 420 Mass. 542 (1995), where the SJC held that placing a glassine bag down the front of one's pants does not rise to the level of probable cause, where the observations were made during a routine traffic stop and not during an ongoing police surveillance concerning suspected drug activities. The setting is what differentiates **Alvarado** from **Rivera** and **Benitez** below.

Probable Cause to Arrest When Plastic Bag Placed into Groin Area [investigation concerning drugs]

In **Commonwealth v. Benitez**, 37 Mass. App. Ct. 722 (1994), police observed the defendant was handed something while seated in an automobile. The defendant then left that automobile holding a plastic bag in a closed fist. He then entered his own automobile and placed the plastic bag inside the groin area of his pants. As the police approached the defendant they observed that his pants were undone. One of the officers then reached into the automobile and seized the plastic bag from the groin area of the defendant's pants. The Court held that this fact pattern is controlled by the **Rivera** decision. They stated that identification of a plastic baggie in a person's possession coupled with evasive reactions by him will readily cumulate to provide probable cause. The defendant in **Benitez** was under investigation for drug activity.

Combination of Plastic Bag and Furtive Movement Not Probable Cause [investigation not concerning drugs]

In **Commonwealth v. Alvarado**, 420 Mass. 542 (1995), police stopped a motor vehicle on Route 495 for traffic violations. Upon approaching the vehicle, the police officer observed a clear plastic material, which he believed to be a glassine bag, in the fist of the front seat passenger. The officer further observed the passenger placing that object down the front of his pants. The SJC held that those observations ***did not rise to the level of probable cause.*** The Court stated that "[t]he view of an object of the type commonly used to store controlled substances, is not sufficient to provide the viewing officer with probable cause to seize that object or arrest the individual possessing that object." Additionally, the SJC held that "[n]or does the observation of a furtive gesture, such as attempting to conceal an object, give rise, in and of itself, to probable cause." The Court stated that "[w]e are of the opinion that the combination of these two factors is more akin to a situation giving rise to a reasonable suspicion based on articulable facts justifying a threshold inquiry than to probable cause." The defendant here was not already under surveillance for drug activity, nor was the location a high crime area.

Probable Cause to Arrest When Prescription Pill Bottle Discovered in Groin Area

Recently, in **Commonwealth v. Clermy**, 421 Mass. 325 (1995), the SJC held that the discovery of a small pill bottle secreted in the groin area of a suspect amounted to probable cause that a violation of the narcotic drug laws was afoot. In **Clermy**, police initially placed the defendant under arrest for two outstanding motor vehicle default warrants. During a search incident to arrest, police discovered a small pill bottle in the defendant's groin area. The SJC held that "[i]t is eminently reasonable to infer that a prescription bottle carried in this manner would contain contraband, and, most probably, a controlled substance." The Court looked at the following factors in assessing whether probable cause existed:

1) the defendant had been picked up in an area in which the police recently had made a number of arrests for serious narcotic offenses
2) the defendant was first observed sitting on the steps of a building known to be used for the distribution and consumption of crack
3) the defendant appeared to be apprehensive when approached by the police
4) the officers initially discovered a telephone beeper on the defendant

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5) most significantly, the defendant had concealed a prescription pill bottle between his legs

Dwelling House Arrests—Expectation of Privacy

Search of Briefcase Tossed Out of Window While Attempting to Execute an Arrest Warrant

In **Commonwealth v. Straw**, (1996), police attempted to execute a default warrant issued against the defendant for the charge of assault with intent to murder. The defendant was living with his parents. While a police officer was talking with the defendant's mother at the front door, a second officer positioned at the rear of the house saw a window opened on the second floor and a briefcase thrown to the yard below. The briefcase, which was thrown by the defendant, landed about six to ten feet from the house in the back yard between the house and a wrought iron fence. The officer pried open the briefcase and discovered a plastic glassine bag containing cocaine. The Court suppressed the evidence.

Editor's Note on Exigency Argument: The Court held that since there was nopotential loss or destruction of evidence, there were no exigent circumstances justifying the search of inside of the briefcase. The Court also stated that there was nothing to indicate that the briefcase might have contained any dangerous instruments or substances. Although police could have seized the breifcase under the circumstances, a search warrant would be required before it could be opened and it's contents inspected.

Editor's Note on Abandonment Argument: The Supreme Court of Massachusetts stated that since the defendant intended to protect his property from any public scrutiny by placing the property in a closed and locked breifcase and disposing it by throwing it into the fenced-in curtilage of his family's home, he maintained a reasonable expectation of privacy in it. As such, police needed probable cause and a search warrant to open in up and search it.

Exigent Circumstances—Dwelling Houses

Firearms Unlawfully Possessed Inside Dwelling Not Exigent Circumstances

In **Pasqualone v. Gately**, 422 Mass. 398 (1996), a police officer discovered that a person who had a license to carry issued to him had failed to reveal that he had earlier been convicted in the state of Delaware for unlawfully carrying a concealed weapon. Concluding that the person had lied on his application, the police officer considered that license to carry "revoked." Police then went to the defendant's home where they made a warrantless nonconcensual entry and seized his firearms. The Court held that the entry was not justified because the circumstances were not exigent. Merely possessing firearms and ammunition inside of a dwelling house without the necessary licensing requirements (license to carry or FID) do not trigger exigent circumstances.

College Dormitory Entries and Searches

Dormitory Inspection to Enforce Health and Safety Regulations

In **Commonwealth v. Neilson**, 423 Mass 75 (1996), a college student from Fitchburg State College signed a residency contract permitting college officials to effect searches of his dormitory suite to enforce the college's health and safety regulations.

Meow— Meow—Meow!

In Commonwealth v. Neilson, 423 Mass 75 (1996), the entry was effected by college officials because a kitty cat was heard meowing. The Court stated that a search for an elusive meowing feline fit within the scope of consent of the residency contract.

Campus Police Require Probable Cause and a Search Warrant Unless an Exigency Exists

In **Commonwealth v. Neilson**, 423 Mass 75 (1996), once the college officials were inside, they discovered two four foot tall marijuana trees. The campus police were then summoned who then seized the contraband. The police entered the room without a warrant, consent, or exigent circumstances. The Court held that the search was unreasonable and violated

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the defendant's Fourth Amendment rights. The Commonwealth contended that, since the college officials were in the room by consent, and observed the drugs in plain view while pursuing legitimate objectives, the police officers' warrantless entry was proper. Furthermore, the Commonwealth argues, the police action was lawful because it did not exceed the scope of the prior search and seizure by college officials. The Massachusetts Supreme Judicial Court disagreed *for the following two reasons:*

1) there was no consent to the police entry and search of the room

> **Editor's Note:** The defendant's consent was given, not to police officials, but to the University and the latter cannot fragmentize, share or delegate it. While the college officials were entitled to conduct a health and safety inspection, they clearly had no authority to consent to or join in a police search for evidence of crime.
>
> **Editor's Additional Note:** The college officials could have reported their observations to the police, *who could have used the information to obtain a warrant.*

2) the plain view doctrine does not apply to the police seizure, where the officers were not lawfully present in the dormitory room when they made their plain view observations

> **Editor's Note:** While the college officials were legitimately present in the room to enforce a reasonable health and safety regulation, the sole purpose of the warrantless police entry into the dormitory room was to confiscate contraband for purposes of a criminal proceeding. An entry for such a purpose required a warrant where, as here, there was no showing of express consent or exigent circumstances.

The Court concluded that when the campus police entered the defendant's dormitory room without a warrant, they violated the defendant's Fourth Amendment rights. All evidence obtained as a result of that illegal search must be suppressed.

Special Needs Entry—Occupant Suffering From Mental Illness Via 123 § 12

Policy Effecting Nonconsensual Warrantless Entry Permissible

In **McCabe v. Life-Line Ambulance Service,** 1996 WL 78310 (1st Cir. Mass.), the United States District Court of Appeals held that the policy of the city of Lynn permitting their police officers to effect nonconsensual warrantless entries to serve an involuntary committal order signed by a physician pursuant to c. 123 § 12 on a recalcitrant dangerous mentally ill person was permissible as a "special needs" entry. The question confronted by the Court was whether the presribed statutory search procedure pursuant to c. 123 § 12 violates the Fourth Amendment since it routinely allows warrantless entries of a residence, *absent exigent circumstances,* to effect involuntary commitments. Such an entry is reasonable held the Court. The Court stated that the entry falls squarely "within a recognized class of systematic 'special need' searches which are conducted without warrants in furtherance of important administrative purposes." In **Griffin v. Wisconsin,** 483 U.S. 868 (1987), cited by McCabe, the USSC stated that "[w]e have permitted exceptions when 'special needs,' beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."

Parens Patriae and Police Power to Effect Searches Pursuant to c. 123 § 12

In **McCabe v. Life-Line Ambulance Service,** 1996 WL 78310 (1st Cir. Mass.), the United States District Court of Appeals stated that "[t]he legitimacy of the State's parens patriae and police power interests in ensuring that 'dangerous' mentally ill persons not harm themselves or others in beyond dispute."

Rejection of Warrant Requirement by McCabe

In McCabe, the Court rejected the argument that a warrant would be required under the circumstances. They stated that "[t]he potential consequences attending a delayed commitment—both to the mentally ill subject and others—may be extremely serious, sometimes including death or bodily injury."

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Four Categories of Involuntary Commitment Pursuant to c. 123 § 12

The involuntary commitment statute authorizes four commitment procedures:
1) Any physician [] or qualified psychiatric nurse mental health clinical specialist [] or a qualified psychologist [], who after examining a person has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a ten day period at a public facility or at a private facility authorized for such purposes by the department.
2) If an examination is not possible because of the emergency nature of the case and because of the refusal of the person to consent to such examination, the physician, qualified psychologist or qualified psychiatric nurse mental health clinical specialist on the basis of the facts and circumstances may determine that hospitalization is necessary and may apply therefore.
3) In an emergency situation, if a physician, qualified psychologist or qualified psychiatric nurse mental health clinical specialist is not available, a police officer, who believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization of such person for a ten day period at a public facility or a private facility authorized for such purpose by the department.
4) Any person may make application to a district court justice or a justice of the juvenile court department for a ten day commitment to a facility of a mentally ill person whom the failure to confine would cause a likelihood of serious harm. After hearing such evidence as he may consider sufficient, a district court justice or a justice of the juvenile court department may issue a warrant for the apprehension and appearance before him of the alleged mentally ill person, if in his judgment the condition or conduct of such person makes such action necessary or proper.

In **McCabe**, the Court stated that since only category four above expressly incorporates a warrant requirement, "we think it clear that the statute implicitly authorizes warrantless searches and seizures in the three remaining contexts." The Court also stated that since the patient refused to be examined, the doctor, in issuing the pink slip, based his opinion exclusively on reports from family members and neighbors. This satisfied the category 2 situation above. ***See important editor's note below.***

Duly Issued Pink Paper From Physician Constitutionally Triggering Warrantless Police

In **McCabe** the Court, in holding category 2 above constitutional, stated that "[a] police officer is permitted to enter a residence without a warrant for the exclusive purpose of detaining a recalcitrant and dangerous mentally ill person pursuant to a duly issued pink paper, but may not engage in a generalized search."

Editor's Note on Police Officer Executing Pink Slip: The pink paper in issue in **McCabe** was signed and issued by a physician based on his medical opinion and knowledge of the past history of the patient. Additionally, the opinion only addresses the constitutionality of category 2 situations. ***This opinion does not state that such entries will be permissible where a police officer executes a pink paper pursuant to a category 3 situation.***

Additional Procedural Protections Under Article 14

Because the Supreme Judicial Court could extend additional protections pursuant to article 14 of the Massachusetts Declaration of Rights, police officers should attempt to obtain a warrant of apprehension issuable pursuant to c. 123 § 12(e) which states:

> "Any person may make application to a district court justice or a justice of the juvenile court department for a ten day commitment to a facility of a mentally ill person whom the failure to confine would cause a likelihood of serious harm. After hearing such evidence as he may consider sufficient, a district court justice or a justice of the juvenile court department may issue a warrant for the apprehension and appearance before him of the alleged mentally ill person, if in his judgment the condition or conduct of such person makes such action necessary or proper."

Lastly, it may be possible to obtain a search warrant under the circumstances pursuant to the common law clause contained in c. 276 § 1 which governs articles which may be seized under a search warrant. *Under M.G.L.A. c. 276, § 1, the following articles may be seized:*

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(1) property or articles stolen, embezzled or obtained by false pretenses, or otherwise obtained in the commission of the crime;
(2) property or articles which are intended for use, or which are or have been used, as a means or instrumentality of committing a crime, including, but not in limitation of the foregoing, any property or article worn, carried or otherwise used, changed or marked in the preparation for or preparation of or concealment of a crime;
(3) property or articles the possession of which is unlawful, or which are possessed or controlled for an unlawful purpose; ***except property subject to search and seizure under §§ 42 through 56, inclusive, of M.G.L.A. chapter 138***
(4) the dead body of a human being
(5) the body of a living person for whom a current arrest warrant is outstanding

Common Law Clause

G.L. c. 276 § 1 further states that "nothing in this section shall be construed to abrogate, impair or limit powers of search and seizure under other provisions of the General Laws or under the common law."

Domestic Arrests—Police Powers and Jurisdictional Issues

Arrest Powers on Domestic Abuse Occurring Outside Jurisdiction

Police officers often inquire as to whether they have extra-territorial arrest powers whenever a 209A defendant they are seeking is discovered outside of their jurisdiction. Additionally, another issue that frequently surfaces is whether police have arrest powers when they are notified that a 209A defendant is presently within their jurisdiction and is wanted by an outside agency within Massachusetts for domestic violence. Does it make any difference if a restraining order is in effect?

Editor's Note Where 209A-Defendant Leaves Jurisdiction: Just because police are investigating a 209A situation, it does not expand or extend their powers of arrest. Unless police are engaged in fresh and continued pursuit of a 209A defendant, they have no right to effect an arrest outside of their jurisdiction. In fact, the only way a police officer could effect an arrest outside of his jurisdiction without engaging in fresh and continued pursuit would be if he were effecting an arrest for a felony as a citizen or if he had an arrest warrant. Since most 209A situations are misdemeanors, police officers will not be able to leave their jurisdiction to effect the arrest. To ensure that the 209A-defendant is captured, police can either obtain an arrest warrant from the clerk magistrate or they may rely on c. 276 § 28, discussed below.

C. 276 § 28—Arrest on Probable Cause That Defendant in Your Jurisdiction Has Violated Order

M.G.L.A. c. 276 § 28 states that "[a]ny officer authorized to serve criminal process [] may arrest, without a warrant, and detain a person whom the officer has probable cause to believe has committed a misdemeanor by violating a temporary or permanent vacate, restraining, or no-contact order or judgment issued pursuant to section eighteen, thirty-four B or thirty-four C of chapter two hundred and eight, section three, four or five of chapter two hundred and nine A, section thirty-two of chapter two hundred and nine, or section fifteen or twenty of chapter two hundred and nine C.

Editor's Note: Even though the statute uses the words "may arrest," the above provision should be interpreted as requiring a mandatory arrest by the foreign agency whenever an order has been violated in light of the statutory language of c. 209A § 6.

C. 276 § 28—Arrest on Probable Cause That Defendant in Your Jurisdiction Has Committed Domestic Abuse

M.G.L.A. c. 276 § 28 also states that "[s]aid officer may arrest, without a warrant, and detain a person whom the officer has probable cause to believe has committed a misdemeanor involving abuse as defined in section one of chapter two hundred and nine A or has committed an assault and battery in violation of section thirteen A of chapter two hundred and sixty-five against a family or household member as defined in section one of chapter two hundred and nine A.

Defendant Discovered in Your Jurisdiction Can Be Arrested Without a Warrant on Probable Cause

Therefore, irrespective of whether an order is in effect, police may effect the arrest of a 209A defendant found within

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their jurisdiction on ***probable cause*** that he or she has committed a 209A violation anywhere within the Commonwealth of Massachusetts. The agency effecting the arrest can either transport the defendant back to the requesting agency or the requesting agency may transport the defendant back to their jurisdiction from the arresting agency, whichever policy they have. [**Editor's Note:** See below the duel booking process.] Remember, that since the defendant has already been placed under arrest by the arresting agency, there will be no legal problem concerning misdemeanor arrest powers of the requesting agency outside their jurisdiction. The defendant has already been placed under formal arrest. Even though it is their case, the requesting agency is merely transporting the [already-under-arrest] defendant back to their jail for processing.

Editor's Example: The Fall River police respond to a domestic disturbance. Pursuant to their investigation, they develop probable cause that Smith has battered and abused his wife. There is no restraining order in effect. Fall River police additionally discover that the suspect is in New Bedford at his workplace. The above chapter and section, c. 276 § 28, empowers the New Bedford police on probable cause to go the suspect's workplace and effect his arrest. The New Bedford police can either transport the suspect back to the Fall River police department or the Fall River police can go to New Bedford where the [already-under-arrest] suspect can be transferred over to them by the New Bedford police. If the latter alternative is utilized, the transfer could be effected either at the arrest scene or back at the New Bedford police station, depending on how the New Bedford police would prefer to document the arrest. Lastly, it should be noted here that in this example the New Bedford police would only be effecting the arrest, they would not be initiating the criminal complaint procedure against the suspect. That would be completed by the Fall River police once they return to their police station and process the suspect. Remember, that the Fall River police could not effect the misdemeanor arrest in New Bedford because they are outside their jurisdiction.

Editor's Note on Duplicate Booking: In the above fact pattern, it should be the policy of the New Bedford police department to first bring the suspect to their stationhouse and run him through the booking process to properly record the fact that he has been arrested. Subsequent to the New Bedford booking procedure, the suspect can then be turned over to the Fall River police, who will then transport the suspect back to Fall River and run him through their own booking procedure. This duplicate booking procedure ensures that the both police agencies have properly recorded the facts and circumstances of the arrest and transfer of the suspect.

Police Outside Territorial Jurisdiction Have No Arrest Powers—Even on 209A Violations

What if the Fall River police in the above example went to the defendant's workplace in New Bedford and effected his arrest? Would this be permissible? Answer—no. Why? Because the Fall River police only have arrest powers within their territorial jurisdiction. Since they are in New Bedford, they are no longer police officers. Addtionally, since the crime of domestic assault and battery is only a misdemeanor, the Fall River police will be unable to effect an arrest as a citizen. Furthermore, even if a violation of a 209A order ocurred, the Fall River police would still be unable to effect an arrest. Why? Because violating a 209A order is only a misdemeanor.

Editor's Note on Felony: However, if probable cause exists that a the defendant committed a felony as part of the domestic abuse violation, whether or not an order was in effect, the Fall River police could effect an arrest anywhere within the Commonwealth of Massachusetts. No warrant, or no fresh and continued pursuit would be required. It would be valid as a citizen's arrest—*as long as probable cause existed at the time of the arrest.*

Abuse Prevention Order—Violation by Sending Flowers

In **Commonwealth v. Butler**, 40 Mass. App. Ct. 906 (1996), the Court decided that the act of sending of flowers by the defendant to the plaintiff would constitute a violation of a 209A restraining order. The language of a 209A restraining order which requires the defendant "not to contact the plaintiff...either in person, by telephone, in writing, or otherwise, either directly or indirectly or through someone else" will include situations where the defendant sends flowers to the plaintiff.

Abuse Prevention Order—Nonhostile Intent Irrelevant

In **Commonwealth v. Butler**, 40 Mass. App. Ct. 906 (1996), the Court held that protestations of nonhostile intent or a desire to make amends on the part of the defendant are irrelevant to the enforcement of a no-contact order.

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Civil Action Taken Against Police Officer—Good Faith Statutory Defense

C. 209A § 6 states that "[n]o law officer shall be held liable in any civil action regarding personal injury or injury to property brought by any party to a domestic violence incident for an arrest based on probable cause when such officer acted reasonably and in good faith and in compliance with this chapter and the statewide policy as established by the secretary of public safety."

Venue of 209A Domestic Abuse—C. 277 § 62A

Any criminal violation of chapter two hundred and nine A may be prosecuted and punished in the territorial jurisdiction in which the violation was committed or in which the original order under said chapter two hundred and nine A was issued.

Police Powers of Arrest Pursuant to 209A—Two Prong Test Example

Massachusetts uses the two prong test approach in establishing probable cause whenever they develop or receive information from a third-party. The test is made up of a veracity prong and a basis of knowledge prong. **Example:** Police respond to a domestic violence call. Upon their arrival, they meet Mrs. Smith. Mrs. Smith states to the police that she has just had a fight with her husband Fred. Police are told by Mrs. Smith that Fred grabbed her by her bathrobe and threw her onto the floor. She states that Fred is across the street at the local tavern having a few cocktails. Since Mrs. Smith is a **victim**, she is inherently reliable. No track record or corroboration of facts is required. Therefore, the veracity prong is satisfied. As for the second prong of the test, the basis of knowledge prong, she has already personally stated that she herself was thrown down onto the ground by Fred. This satisfies the basis of knowledge prong. Since both prongs of the test are met, probable cause fully exists to effect the arrest of Fred.

Editor's Note on Spousal Denial of Assault: A common misconception exists between many police officers concerning the above example and whether probable cause to arrest will continue to exist even where the defendant denies the allegations in front of police. The common misconception which exists is that the denial will somehow reduce the evidentiary value of the victim's statement from probable cause to reasonable suspicion, thereby taking away the officer's power of arrest. Irrespective of the denial, probable cause will continue to exist as well as the officer's power of arrest. The evidentiary value of the statements will be weighted by the court.

Police Interrogation—What Amounts to Interrogation?

Police Response of "Why?" in the Face of Initial Incriminating Statement Made by Defendant

In **Commonwealth v. Diaz,** 422 Mass. 269 (1996), the defendant was placed under arrest. He was later fingerprinted by detectives. Before being printed, the defendant blurted out, "This is really going to fuck me up." The detective then responded, "why?", and the defendant made a second statement, saying that he had handled one of the firearms used in the crime on the previous day. The issue presented here was whether the **Miranda** warnings were required for both of the statements made by the defendant. The Court stated that the first statement ["This is really going to fuck me up."], was spontaneous and unprovoked by the police detective, there no **Miranda** warnings were first required. The detective's response ["why?"], a one word question, was described by the Court as a "natural flex action" of the detective, invited by the defendant's first statement. The Court stated that "[a]lthough the second statement was incriminatory, it was volunteered and not the product of improper probing questioning."

Police Interrogation—Reinterrogation

Clarification of Criminal Charge Held to be Interrogation

In **Commonwealth v. Chadwick,** 40 Mass. App. Ct. 425 (1996), the defendant was administered the **Miranda** warnings. After waiving the **Miranda** warnings, he was questioned concerning sexually assaulting his daughter. After making an inculpatory statement, he invoked his right to counsel. He was then arrested and booked. The next day, and while still in continuous custody, he stated to a police detective that he knew that he did not rape his daughter. The detective then replied as follows: "I will tell you one thing, but this is not meant to be a question. Rape is not always what people think

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and things like oral sex are rape." The defendant then replied, "Well I don't know where I go from here, because if that's considered rape then I guess I'm guilty." The Court held that the police violated the rule of **Edwards v. Arizona**, 451 U.S. 477 (1981) which states that once a prospective defendant invokes his right to counsel, further interrogation without counsel is impermissible. The Massachusetts Court of Appeals stated that "[t]he officer's response to the exculpatory statement by the defendant, though not posed as a question, certainly invited a response." The Court then ruled that "when a suspect in custody asks for a lawyer, discussion of the charge should cease unless that suspect changes his mind, either in so many words or by conduct clearly to that effect."

Police Interrogation—Miranda Not Required for Booking Phone Numbers

Miranda Not Required Where Police Routinely Asked Defendant For Phone Number Called at Booking

In **Commonwealth v. White**, 422 487 (1996), the police routinely wrote down the telephone number the defendant would call subsequent to booking pursuant to c. 276 § 33A. The Court stated that "the **Miranda** warnings are only implicated by words or actions on the part of the police that they should know are reasonably likely to elicit an incriminating response." A police policy of routinely writing down and keeping track of telephone calls made by a defedant exercising his or her rights pursuant to c. 276 § 33A, does not require **Miranda**.

Police Identification—Video Showup One on One

One on One Video Showup Four Days Subsequent to Event Permissible

In **Commonwealth v. Austin**, 421 Mass. 357 (1995), the Massachusetts Supreme Court permitted the viewing by a witness of a bank surveillance videotape taken of an armed robbery suspect in the act of a subsequent robbery three days later. It was not unnecessarily suggestive under the circumstances. In **Austin**, an armed man entered the First Federal Savings Bank in Somerset and attempted to rob it. A female employee of the bank gave a very fitting description to police. She also went to the Somerset police department and assisted ther Somerset police in manufacturing a composite drawing of the suspect. Three days later, a bank in Rhode Island was robbed. This robbery was captured on the bank's surveillance video camara. The police watched the videotape of the robbery and noticed that the individual on the videotape resembled the witness's composite drawing of the Somerset robber. The mannerisms displayed by the Rhode Island robber, and the similar modus operandi, led the police to believe that the two banks had been robbed by the same individual. Additionally, a Somerset detective learned from a colleague of a recent armed robbery in Salem, New Hampshire, having characteristics similar to the Somerset and Rhode Island robberries. The next day [four days after the Somerset attempt], the police showed the videotape of the Rhode Island robbery to the witness. Within seconds of observing the man on the videotape, the witness stated that he was the man who robbed the Somerset bank.

The Massachusetts Supreme Judicial Court stated that "[t]he identification procedure using the surveillance videotape was similar to a one-on-one confrontation between the suspect and the witness." The Court concluded that, in circumstances, which included a serious risk to public safety posed by a series of crimes having similar modus operandi and [an] eyewitness[] who appeared exceptionally nonsuggestible, the police had good reason for what they did, and the surveillance videotape identification was not, as a result, unnecessarily suiggestive."

Police Identification—Unnecessarily Suggestive Identification

Unnecessarily Suggestive Identification Not Arranged by the Police

In **Commonwealth v. Jones**, 423 Mass. 99 (1996), two Vietnamese men and two African-American men forcibly entered a home in Fitchburg and assaulted an occupant in the late afternoon. Within three hours of the crime, police arrested the two Vietnamese culprits. There was evidence that the two Vietnamese males had stayed at the Super 8 Motel in Leominster with two black men. An assistant manager at the Super 8 testified that she observed one of the black males [the defendant] in the company of the Vietnamese men in the afternoon on the day of the crime. She subsequently made an in-court identification of the defendant [Jones]. The basis of her identification was objected to by the defendant claiming that it was based on highly suggestive confrontations with the defendant that neither the police nor the prosecution arranged and further, that the identification was not based independently on the witness's original observations of the person whom she identified as the defendant.

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The assistant manager [the witness], was on duty the afternoon of the crime. At some point during the the afternoon, she observed a black man come into the lobby walking from the front door to the elevator, and he disappeared into the elevator and reemerged about 10 minutes thereafter. He went back outside through the lobby and got into a car and drove away. The witness observed that person for three minutes. At the time of her observation, there was no event then transpiring at the motel to draw her attention to him in any particularized way. Three months later, while attending a probable cause hearing under a summons issued by counsel for a co-defendant, she wound up sitting in a courtroom. At some point, the defendant [Jones] and the co-defedant [a Vietnamese male] were in the courtroom handcuffed and shackled together. She had the opportunity to watch them for more than an hour. At no time while she was in the courthouse did she have any contact with the district attorney or police officials. Neither did the district attorney nor the police in any way, assisted in the observations made by the witness. Another six months later, she was summonsed by the Commonwealth in connection with a suppression motion. While seated in the courtroom hallway, she observed Jones again shackled to the co-defendant being led into the courtroom. Again neither the district attorney nor the police arranged for her to view Jones. When the witness eventually testified at the suppression motion, both the co-defendant and the defendant-Jones were seated at the counsel table, clearly the object of the courtroom proceeding. She then made an in-court identification of Jones.

Editor's Note: Both of the confrontations between the assistant manager and Jones were accidental in the sense that the Commonwealth played no part in arranging or assisting in arranging those encounters. In other words, there was no state action. However, should the same considerations that are relevant to a governmental-based challenge to admission of an identification be involved in deciding the admissibility of an identification arguably tainted by a civilian-conducted suggestive confrontation? The Massachusetts Supreme Judicial Court found that these identifications were highly suggestive and that her subsequent in-court identification of the defendant were based on these suggestive confrontations. Bypassing the issue of state action, the Court stated that "[c]ommon law principles of fairness dictate that an unreliable identification arising from the especially circumstances of this case should not be admitted."

Right to Presentment—6 Hour Safe Harbor Rule

Massachusetts Rules of Criminal Procedure

Rule 7(a)(1) of the Massachusetts Rules of Criminal Procedure provides that "[a] defendant who has been arrested shall be brought before a court if then in session, and if not, at its next session."

Editor's Note: The intention in back of this rule is that the presentment should occur as soon as possible. However, police departments had difficulty interpreting the extent of the rule once an arrest was effected. For an example, if police arrested a murder suspect at 9:00 a.m., would it be unreasonable to interrogate him throughout the day and then have him arraigned the following morning, or would police have to arraign him as soon as possible subsequent to the arrest. Certainly the law should permit police officers to conduct an interrogation of the suspect subsequent to the arrest. However, police must not be able to unreasonably delay the right of the defendant to prompt presentment in order to receive a confession through police custodial interrogation. Recently, the SJC in **Commonwealth v. Rosario**, 422 Mass. 48 (1996), adopted a bright line rule where a criminal defendant is not arraigned within six hours of his arrest, any statements he makes prior to arraignment will be suppressed on the ground of "unreasonable delay" unless the defendant has waived the right to be arraigned without unreasonable delay. The Court stated that police officers are entitled to a clear rule concerning both the right of the police to question an arrested person and the standard for suppressing statements made by a defendant after arrest and before arraignment.

6 Hour Arraignment or Statements Barred Based on Unreasonable Delay

In Commonwealth v. Rosario, 422 Mass. 48 (1996), the SJC held that where a criminal defendant is not arraigned within six hours of his arrest, any statements he makes prior to arraignment will be suppressed on the ground of "unreasonable delay" unless the defendant has waived the right to be arraigned without unreasonable delay. The Court stated that "an otherwise admissible statement is not to be excluded on the ground of unreasonable delay in arraignment, if the statement is made within six hours of the arrest (day or night), or if (at any time) the defendant made an informed and voluntary written or recorded waiver of his right to be arraigned without unreasonable delay."

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Editor's Note on Safe Harbor: This new rule requires an additional waiver of the right to prompt presentment by the defendant *if the incriminating statements are made to police six hours or more after the arrest.* In other words, police will be navigating in a safe harbor for the first six hours subsequent to the arrest and the additional waiver of prompt arraignment will not apply within that time frame.

Applicability of Rule to Nighttime and Weekend Arrests: It will make no difference if the arrest is effected during the nighttime or on the weekend when the Courts are closed. The six hour rule will still apply. Therefore, in order for an incriminating statement to be admissible after six hours has elapsed subsequent to the arrest, police must receive from the defendant a knowing, intelligent and voluntary waiver of the **Miranda** warnings as well as "an informed and voluntary written or recorded waiver of his right to be arraigned without unreasonable delay."

Excluded Statements Outside of Safe Harbor Rule Includes Crimes to Which No Complaint Has Been Issued

In **Commonwealth v. Ortiz**, 422 Mass. 64 (1996), the SJC stated that there was no need to distinguish between police questioning about a crime as to which charges are pending and a crime as to which no complaint has yet been issued. Therefore, where police arrest a person on a warrant [i.e., where probable cause determination is made by independent source other than the police], the six-hour safe harbor rule will still apply where the questioning applied to that same offense.

Type of Waiver of Presentment Required Where Police Navigate Outside Safe Harbor *[written or recorded]*

In **Commonwealth v. Rosario**, 422 Mass. 48 (1996), the SJC stated that "an informed and voluntary written or recorded waiver of his right to be arraigned without unreasonable delay" will be required if police are navigating outside of the 6 hour safe harbor rule.

Police Procedures Which Must Be Undertaken Where Police Navigate Outside Safe Harbor

In **Commonwealth v. Rosario**, 422 Mass. 48 (1996), where the police attempt to obtain an incriminating statement from a subject under arrest for longer than six hours, the following police procedures must be adhered to:

a) the individual has been informed of his right to a reasonably prompt arraignment and has made an informed and voluntary written or recorded waiver of that right
b) the statement is made following a knowing, intelligent, and voluntary waiver of the **Miranda** warnings, and
c) the requirements of c. 276 § 33A, notice of the rights to a telephone call, are afforded

Tolling of the Safe Harbor Rule

In **Commonwealth v. Rosario**, 422 Mass. 48 (1996), the SJC stated that if the person is incapacitated because of a self-induced disability, such as the consumption of drugs or alcohol, when he or she is arrested, "the six hour period [will] commence only when the disability terminates."

Police Make Determination Whether Safe-Harbor Should Be Tolled

In **Commonwealth v. Christolini**, 422 Mass. 854 (1996), the Massachusetts Supreme Judicial Court stated that it is "implicit in the tolling of the safe-harbor period because of intoxication is the ability of police themselves to make that determination, subject to judicial review."

Protocol Recommended by the Office of the Attorney General

In the March 1996 Law Enforcement Newsletter from the Office of the Attorney General, *the following protocol is recommended:*

■ Police officers should ensure that the time of the arrest is documented and that upon arrival at the station, the arrested individual is immediately notified of his right to use the telephone ***and is afforded the right to use the telephone within one hour.***

■ The police officers and booking sergeant should ensure that the booking procedure is expedient—the six hour clock

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will be ticking.

■The interview of the arrested individual should take place as quickly as possible after the booking process is completed. The interviewing officer should ensure that the arrested individual has been advised of his **Miranda** rights and that before the questioning begins, the arrested individual has made a voluntary, intelligent, and knowing waiver of his Miranda rights.

■Police officers should always be mindful of the six-hour "clock."

■If the questioning begins before the six-hour "clock" has expired, no arraignment warning/waiver need be presented to the arrested person before questioning.

■If questioning has begun within the six-hour period but it appears that the questioning will not be completed within the six-hour period, the prompt arraignment notice/waiver should be presented to the arrested individual for his signature if this has not already been done. Generally, the detectives taking the statement will present the waiver to the arrested person. If the arrersted individual refuses to sign the prompt arraignment notice/waiver, questioning should not necessarily cease [if police are still within the safe harbor rule].

■If the interview does not begin before the six-hour "safe harbor" period expires, the police officer conducting the interview must present the arraignment notice/waiver to the arrested individual for his signature before the questioning begins. If the arrested individual refuses to sign the prompt arraignment notice/waiver, police should not necessarily cease questioning. Police officers should note that the arrested individual was advised of his right to be arraigned promptly and he indicated he wanted to be arraigned. Note, however, that if the arrested individual invokes his Fifth Amendment right not to incriminate himself or his Fifth Amendment right to counsel, then questioning must cease.

Editor's Note: Where the arrestee refuses to sign the prompt arraignment waiver, continued questioning is suggested by the AGs office. This may lead to additional clues or avenues the investigation can follow. However, if the arrestee invokes his Fifth Amendment right not to incriminate himself or his Fifth Amendment right to counsel, ***then questioning must cease.***

■Police officers should note the time that the interview started and the time it ended. Police officers taking statements should be careful to distinguish between the time the interview began and the time the statement was typed, if the statement is not typed simultaneously with the giving of the statement (the preferred procedure).

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Model Waiver of Miranda and Presentment

The following is a model waiver of the **Miranda** warnings and a waiver of the right to presentment based on the recent case of **Commonwealth v. Rosario**, 422 Mass. 48 (1996):

■ **Right to the Telephone**

■ Pursuant to c. 276 § 33A, you have the right to use the telephone to communicate with family or friends, or to arrange for bail, or to contact an attorney. Do you understand this right?

■ **Miranda Warnings**

■ You have the right to remain silent—do you understand this right?
■ Anything you say can be used against you at trial—do you understand this right?
■ You have the right to an attorney—do you understand this right?
■ If you cannot afford an attorney, one will be appointed to you by the Commonwealth at no expense and prior to any questioning—do you understand this right?
■ If you decide to waive your Fifth Amendment Rights pursuant to **Miranda**, you may stop answering questions at any time if you so desire—do you understand this right?

■ **Presentment Warnings**

■ You have a right to prompt presentment, that is, to be brought as soon as possible before the court if then in session, and if not, at its next session—do you understand this right?
■ During presentment, if it is acertained that you cannot afford an attorney, one will be appointed for you—do you understand this right?
■ If there is an issue of bail, you will have the right to a hearing—do you understand this right?
■ You have the right to a judicial determination of probable cause within 24 hours if you have been arrested without a warrant—do you understand this right?
■ If you waive your right to prompt presentment, you will be brought to court on: Date__________ Time___________

Waiver of Miranda Warnings
Having these rights in mind, do you now waive your Fifth Amendment Rights pursuant to **Miranda**, and desire to talk to me now concerning this or others matters of concern to us?

______YES, I wish to talk to you now and waive my Fifth Amendment Right pursuant to **Miranda**.

Signature ____________________________ Date ______________ Time ___________
Signature-Witness____________________________ Date ______________ Time ___________
Signature-Police Officer____________________________ Date ______________ Time ___________

Waiver of Prompt Presentment
Having these rights in mind, do you now waive your right to prompt presentment and desire to talk to me now concerning this or others matters of concern to us?

______YES, I wish to talk to you now and waive my right to prompt presentment before the court.

Signature ____________________________ Date ______________ Time ___________
Signature-Witness____________________________ Date ______________ Time ___________
Signature-Police Officer____________________________ Date ______________ Time ___________

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1997 MV Procedure

MVs—Stop and Frisk

Unreasonable Detention After Valid License and Registration Received—Suppression of Observation

In **Commonwealth v. Torres**, 40 Mass. App. Ct. 6 (1996), police effected a stop of a motor vehicle for excessive speed. The vehicle pulled over on the breakdown lane of the highway. The officer then approached the suspect vehicle from the passenger side. Looking through the passenger's side window, the officer observed the passenger conversing with the driver with his back toward the officer. About twenty seconds elapsed and the officer knocked on the window. In response, the passenger opened the door and started to get out. The officer then ushered the passenger to the rear of the car to separate him from the driver. The officer then returned to the passenger side of the vehicle and asked the operator for his license and registration. The operator then produced the requested information. The driver appeared nervous. Once the officer determined that the driver's Massachusetts operator's license and motor vehicle registration were valid and had not expired, he returned to the passenger who remained, as directed, at the rear of the vehicle. The officer then requested the passenger's wallet and subsequently searched it discovering written notes that he believed were drug related. After seizing the wallet from the passenger, the officer, who could still observe the operator through the rear window of the vehicle, noticed the driver move his right hand near his jacket pocket. The officer approached the driver, who remained inside the car. The officer then patted the side of the driver's jacket, felt a hard object, and recovered a telephone beeper. The officer twice asked the operator whether there were drugs in the car. The driver responded, "No, there's no drugs—search." The officer then discovered a plastic shopping bag hidden behind a hinged panel attached to the rear passenger side. The plastic bag contained a number of small baggies with a white powder in them. The passenger and the operator were then placed under arrest. The Court suppressed the evidence.

The **Torres** Court noted that the officer continued to interrogate and detain the passenger ***after*** the operator had produced a valid license and registration. This detention could only be justified if the officer had reasonable suspicion that a crime was being committed or was about to be committed by the passenger. The Court held that there was no such reasonable suspicion and the detention at the rear of the suspect vehicle was unjustified. The Court stated that there was no apparent reason why the passenger and the driver should not have been permitted to continue on their way. If the officer did not unjustifiably detain the passenger at the rear of the vehicle, the officer would not have been in the position to observe the operator's furtive movement. Without that observation, the officer would have had no occasion to obtain the driver's consent to search the vehicle. Without that consent, the officer would not have discovered the cocaine which led to the arrests. The observation of the furtive movement and the discovery of the cocaine was suppressed as fruit of the poison tree.

> **Editor's Note:** The stop was initially permissible because the officer observed a motor vehicle violation. Additionally, the Court held that "[t]he [passenger's] unexpected attempt to get out of the vehicle, coupled with his delay in acknowledging the [officer], justified the [officer's] initial concern and removal of the defendant to the rear of the vehicle for safety reasons." A frisk for weapons on the person of the passenger would have been permissible at this point, *if the officer would have performed one.* However, this unusual conduct by the passenger did not justify the officer in continuing to detain him at the rear of the stopped vehicle ***after*** the operator's license and registration were checked out.

Actions Not Amounting to Reasonable Suspicion to Continue to Detain Passenger

In **Commonwealth v. Torres**, 40 Mass. App. Ct. 6 (1996), the Court held that the following factors did not rise to the level of reasonable suspicion that the passenger was committing or about to commit a crime which would have justified his continued detention at the rear of the suspect vehicle in which he had earlier alighted:

a) the passenger failed to acknowledge the officer's presence for twenty-five seconds
b) the passenger unexpectedly tried to get out of the vehicle [this would have justified a frisk at the time it occurred]
c) the driver resided in an area known to the officer for high drug activity
d) the driver was born in Medellin, Colombia and appeared to be nervous

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Passenger Has a Greater Expectation of Privacy Than Driver

In **Commonwealth v. Torres**, 40 Mass. App. Ct. 6 (1996), the Court stated that in a routine traffic stop, "certainly the passenger has a high expectation of privacy than the driver, because the passenger plays no part in the routine traffic infraction and has reason to suppose that any exchange with the authorities will be conducted by the driver alone."

Refusing to Vacate Passenger Compartment Upon Police Order

In **Pennsylvania v. Mimms**, 434 U.S. 106 (1977), the USSC stated that a police officer may order the operator or occupants out from the passenger compartment of a lawfully stopped vehicle, as long as it takes place at the outset of the stop. The officer is entitled to do this for his own protection. This reduces the opportunity for unobserved movements on the part of the occupants and it also allows the police officer to move off the street and out of the way of traffic. The Mimms decision cited statistics that approximately 30% of shootings of police officers occur during roadside stops. The nature of the crime is not controlling. What if the occupant refuses to alight from the lawfully stopped motor vehicle in disregard of the officer's express order? In **Commonwealth v. Bosk**, 29 Mass. App. Ct. 901 (1991), a motorist stopped for a motor vehicle infraction refused an officer's order to reenter his motor vehicle and demanded that he be able to look at the police radar in the police cruiser. The Court upheld his arrest as a disorderly person because there was no legitimate purpose involved in his actions. The evidence demonstrated that by his conduct he was risking not only his own safety but that of others.

Editor's Note: What legitimate purpose can be served by the operator refusing to comply with a police officer's order to exit a lawfully stopped motor vehicle? Remember that the **Mimms** decision entitles the investigating officer to ***order*** the operator or occupants out of the vehicle. The officer is entitled to do this for his own protection because it reduces the opportunity for unobserved movements on the part of the occupants and it also allows the investigating officer to move off the street and out of the way of traffic. Once the operator or occupant refuses to comply with the officer's order, there is no legal reason why an analogy of **Bosk** cannot be used under the circumstances.

Delay in Acknowledging Presence of Officer Outside Stopped Vehicle by Passenger

In the recent decision of **Commonwealth v. Torres**, 40 Mass. App. Ct. 6 (1996), the Court stated that an officer's concern with a passenger's failure to acknowledge his presence outside of the stopped vehicle for approximate twenty-five seconds justified the removal of that passenger to the rear of the vehicle for safety reasons.

MVs—Pretextual Traffic Stops

Pretextual Traffic Stops

In **Commonwealth v. Santana**, 420 Mass. 205 (1995), police were stationed on the side of Route 24 in West Bridgewater monitoring traffic. The officers were assigned to be on the lookout for traffic violations as well as illegal drug activity during their highway patrol duty. The officers then observed the defendant's motor vehicle with a passenger in the front seat drive by. Suspecting that it might contain drugs, the officers entered the highway and pulled in behind the motor vehicle to observe it more closely. The officers then observed that the motor vehicle had a broken taillight lens and decided to pull the vehicle over to the side of the road. Subsequent to the stop, police discovered cocaine in a clear plastic bag under the passenger's seat. The defendants argued that the stop by the police for the taillight was effected as a pretext to stop and search the vehicle for narcotics. In **Commonwealth v. Santana**, 420 Mass. 205 (1995), the SJC stated that Massachusetts cases follow the "authorization" approach on stopping vehicles. Under that approach, the stop was proper. They stated that "[t]he fact that the [police] may have believed that the defendants were engaging in illegal drug activity does not limit their power to make an authorized stop."

Editor's Note: Recently, in **Whren v. United States**, 116 S.Ct. 1769 (1996), the United States Supreme Court stated that police may effect the stop of motorist whom they have probable cause to believe has committed a civil traffic violation. The officers subjective motive for stopping the vehicle "plays no role in the ordinary probable cause-Fourth Amendment analysis"—even if the stop of the motorist was a pretext for a criminal investigation. However, the Equal Protection Clause of the 14th AMD protects against intentially discriminatory law enforcement based on impermissible considerations such as race.

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MVs—Public Policy Consideration

Checking on the Well Being of a Parked Operator

In **Commonwealth v. Leonard,** 422 Mass. 504 (1996), a police officer observed a vehicle pull off to the side of the roadway into a breakdown area. The officer pulled his cruiser alongside of the vehicle and activated his dome lights. The officer attempted several times to gain the attention of the operator by using the cruiser's PA system, to no avail. The officer then exited his cruiser and approached the driver's side and knocked on the driver's window approximately three or four times. When the operator failed to ackowledge the presence of the officer, the officer opened the driver's door. The female operator looked up at the officer and stated, "what the fuck do you want." The officer then requested her license and registration which she eventually produced. During this time, the officer detected a strong smell of alcohol coming from her breath. She was subsequently placed under arrest for OUI. *The Court stated that the action of the officer was reasonable in light of the circumstances.* Her stopping when and where she did suggested that she was in difficulty. Her failure to acknowledge the officer suggested that she may have been ill. The Court stated that what the officer "did here was a minimally intrusive response to one of the myriad and uncategorizable events that may alert an officer that his assistance may be required."

MVs—Stopping a Motorist Police Believe is Lost; Community Caretaking

Stopping a Lost Motorist Impermissible

Recently, in **Commonwealth v. Canavan,** 40 Mass. App. Ct. 642 (1996), police stopped a motorist believed to be lost. The officer then discovered that the operator was intoxicated. The operator was subsequently then placed under arrest for OUI. Initially, the officer observed the defendant's motionless car adjacent to a rotary. The defendant remained in that position for almost three minutes. He was looking around. The officer then turned his cruiser around to go over toward the defendant's car. The defendant then moved away within a reasonable speed. The officer then stopped at a red a Mobile station which was closed. The officer could still see the defendant operating. The defendant then pulled into the Mobile station parking lot. There was no conversation between the two. The defendant then left the Mobile station and drove down the street. The officer then pulled him over to the side of the roadway where he discovered that the operator was intoxicated. The Court stated that such a seizure of a lost motorist does not predominate any governmental interest. The Court also stated that the officer could have made his presence known in the parking lot of the Mobile station where the motorist had pulled into. If the operator was seeking assistance, he could have simply asked the officer for directions at that time.

Stopping a Motorist for Reasons Unrelated to Law Enforcement or Regulatory Purposes

In **United States v. Dunbar,** 470 F.Supp 704 (D. Conn.), aff'd, 610 F.2d 807 (2d. Cir. 1979), Judge Jon Newman formulated an opinion wherein he described a balancing of the interests of the permissiblity of police officers stopping a lost motorist based on the governmental interest on one side and the privacy interests of the motorist on the other. In **Dunbar,** a Connecticut State Trooper observed a vehicle with Rhode Island plates moving at a slow speed and showing uncertainty in selecting which road he should take. The trooper activated his dome lights and pulled the vehicle to the side of the roadway. The stop led to the discovery of an unlawful weapon in plain view on the front seat and a suspected bomb on the rear floor of the vehicle.

Editor's Note: Since the intrusion clearly amounted to a seizure, the reasonableness of the seizure depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by police officers. The United States Supreme Court recognized in **Cady v. Dombrowski,** 413 U.S. 433 (1973), that police officers may intrude to some extent on the individual's privacy when they perform "community caretaking functions" unrelated to crime-detection or regulatory purposes. The Massachusetts Appeals Court stated that "it is undeniable that the rendering of assistance to a motorist in that caretaking mode ***can in some situations*** justify motor vehicle stops." In **Dunbar,** Judge Newman illustrates this point with a case where the police stop a motorist to inform him that a bridge beyond a bend in the road has washed away, or a case where a road remains passable but the police promote safety by stopping the motorist to inform him about road hazards.

Editor's Note: In **Dunbar,** the Court, as it concerns sinmply a lost motorist, held that the governmental safety interest in aiding the lost motorist is not substantial. On the other hand, the intrusion on the individual is also not substantial. The

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stop is often brief and uneventful. However, the Court held that the balance should to struck on the side of the motorist. In other words, it is not enough that a motorist is possibly lost to permit a police intrusion against the motorist. Additionally, the decision in Dunbar will not inhibit the police from making intrusions amounting to seizures when the governmental interest predominates—thus seizures even of lost motorists is justified ***when safety hazards are actually entailed*** and lights and siren are needed to arouse the attention of the drivers and avoid mishap." Furthermore, the Massachusetts Appeals Court cited with approval the case of **State v. Pinkham,** 565 A.2d 318 (Me. 1989), which states that "[p]olice officers do not violate the 4th AMD if they stop a vehicle when they have adequate grounds to believe the driver is ill or falling asleep."

Editor's Note: Lastly in **Commonwealth v. Canavan,** 40 Mass. App. Ct. 642 (1996), the Court stated that they would reject any seizure conducted by the police of merely a lost motorist. There must be elements concerning safety hazards or illness to make the stop in Massachusetts permissible under the community caretaking function.

MVs—Extrajurisdictional Stops for Misdemeanors (fresh pursuit)

Fresh and Continued Pursuit Law—c. 41 § 98A

G.L. c. 41, § 98A permits extraterritorial fresh pursuit arrests for any *arrestable offense*, whether it be a felony or misdemeanor, initially committed in the arresting officer's presence *and within his jurisdiction.*

Editor's Note: It provides, in part that : "A police officer of a city or town who is empowered to make arrests within a city or town may, ***on fresh and continued pursuit,*** exercise such authority in any other city or town for any offense committed in his presence within his jurisdiction for which he would have the right to arrest within his jurisdiction without a warrant."

The Type of Fresh and Continued Pursuit Required

The term "fresh and continued pursuit" as it relates a police officer's authority to effect a stop outside of his or her jurisdiction is often misunderstood. ***It does not mean refusing to stop.*** If that was the case, then every "fresh and continued pursuit" would be arrestable pursuant to c. 90 § 25 for refusing to submit. It should be looked at as merely a seizure which takes place when an officer engages the suspect vehicle by locking onto it by clearly signalling the vehicle to stop. If a police officer engages a motor vehicle in one jurisdiction and the stop occurs in another jurisdiction, the initial engagement must be based on reasonable suspicion that an arrestable offense has been committed.

Refusal to Stop for Plainclothes Officer Displaying Badge

In **Commonwealth v. Gray,** 423 Mass. 293 (1996), a Detective Joseph Deignan of the Watertown police department observed the defendant speeding in Watertown. The detective was in an unmarked cruiser. Using stobe lights and his horn, he pursued the vehicle and signalled the operator to stop. When the defendant failed to stop, the detective pulled alongside the vehicle and displayed his gold police badge by holding it in his hand and pressing it against the window. The defendant continued to drive until he was forced to stop by traffic in Waltham. In the course of a "pat-down" the detective discovered a bulge in the defendant's jacket containing 53.4 grams of cocaine. The Massachusetts Supreme Court held that the detective could lawfully pursue the defendant into Waltham from Watertown because it is an arrestable offense to fail to stop for a police officer. G.L. c. 90, §§ 21, 25. Therefore, the provisions of c. 41 § 98A were complied with.

MVs—Extrajurisdictional Stops for Misdemeanors (no fresh pursuit)

Stop Outside of Jurisdiction—Based on Properly Transferred Authority to Private Persons

In **Commonwealth v. Morrissey,** 422 Mass. 1 (1996), the Massachusetts Supreme Judicial Court held that an extrajurisdictional stop of an operator suspected of OUI was permissible where there was no fresh pursuit by the officer effecting the initial stop. In **Morrissey**, an officer of the West Boylston police department, officer Jeffery Stillings, requested the neighboring town of Sterling to send an officer [officer Scott McArthur] into West Bolyston to help render assistance in a police matter. On his way back to Sterling, officer McArthur observed a Buick automobile run a stop sign then veer to the right of the road and narrowly miss a telephone pole. McArthur reported these observations to Stillings., who then asked McArthur to effect a stop of this vehicle. McArthur did so within the West Bolyston town limits. Officer

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Stillings then arrived at the scene of the stop and subsequently placed the operator under arrest for OUI. The defendant argued that McArthur had no legal police authority to conduct a stop in West Boylston for a misdemeanor. The SJC held that the stop was lawfully based on properly transferred authority from McArthur to Stillings.

Editor's Note On Transferred Jurisdiction: The SJC stated that under c. 37 § 13, a police officer "may require suitable aid in the execution of their office in a criminal case, in the preservation of the peace, [or] in the apprehending or securing of a person for a breach of the peace." Additionally, c. 268 § 24 states that "[w]hoever, being required in the name of the commonwealth by a sheriff, deputy sheriff, constable, police officer or watchman, neglects or refuses to assist him in the execution of his office in a criminal case, in the preservation of the peace or in the apprehension or securing of a person for a breach of the peace...shall be punished by a fine...or by imprisonment for not more than one month." The SJC stated that based on a reading of these statute, officer Stillings had statutory authority to request the assistance of officer McArthur. Also, if officer McArthur had refused, he would have been subject to criminal penalty.

Editor's Note On Lawfulness of the Stop: Having received McArthur's initial radio report concerning the erratic operation of the defendant's vehicle, officer Stillings had reason to believe that the crime of operating a motor vehicle while under the influence of intoxicating liquor was being committed in Stilling's territorial jurisdiction. Therefore, Stillings ***was authorized to stop the defendant to make an investigative inquiry.*** That authority was transferred to McArthur through Stilling's request for assistance.

Acting as a Private Person: In **Commonwealth v. Morrissey**, 422 Mass. 1 (1996), the SJC held that a requesting officer has statutory authority to request the assistance of any private person pursuant to these statutes. Once the requested assistance was conveyed to McArthur, he was authorized to make the stop, but he was still acting as a private citizen.

Editor's Note On c. 41 § 99: Since these requests did not emanate from the commanding officers, c. 41 § 99, which authorizes police powers outside of the jurisdiction, could not be utilized.

MVs—Extrajurisdictional Stops & Frisks

Effecting a Stop and Frisk Outside of Jurisdiction

A police officer's official authority is limited to the territorial jurisdiction of his or her appointment, unless the officer is engaged in fresh and continued pursuit or is acting under a warrant. There is no provision which permits a police officer outside of his or her territorial jurisdiction to simply conduct a stop and frisk based on reasonable suspicion that the person has, is, or is about to commit a crime. **Commonwealth v. Claiborne**, (1996).

Effecting a Stop and Frisk of Suspect Wanted by Foreign Agency on Reasonable Suspicion

In **Commonwealth v. Claiborne**, (1996), the Massachusetts Supreme Judicial Court addressed this issue. The Court stated that where officers within their territorial jurisdiction have reasonable suspicion based on specific and articulable facts that a suspect discovered within their jurisdiction committed a crime in another city or town, they may effect a stop and frisk of that individual. See also **United States v. Hensley**, 469 U.S. 221 (1985).

MVs—Extrajurisdictional Arrests for Felony (no fresh pursuit)

Felony Arrest Effected Outside of Jurisdiction With No Fresh Pursuit

In **Commonwealth v. Claiborne**, (1996), Brookline police officers effected the arrest of the defendant in the city of Boston. The defendant had committed a number of armed robberies in Brookline during the four weeks previous. Prior to the arrest, the Brookline officers observed the defendant operating in traffic. He was stopped. In side the vehicle police discovered a firearm used in the crimes and a black leather coat with a knit hat also worn by the suspect. Based on his personal description, the description of the vehicle and his direction of travel, the police had probable cause to believe that the suspect had committed the robberies. The Court held that since the Brookline police had probable cause to beleive that the defendant had committed the crimes, they could lawfully effect a citizen's arrest in the city of Brookline.

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Editor's Note on Standard Required: When a police officer makes a warrantless arrest outside of his jurisdiction, and not in fresh and continued pursuit of the suspect within the meaning of c. 41 § 98A, then he acts as a private citizen, and the arrest will be held valid only if a private citizen would be justified in making the arrest under the same circumstances. A private citizen may lawfully arrest someone who has in fact committed a felony. Generally, the "in fact committed" element must be satisfied by a conviction.

Standard Relaxed to Probable Cause: In **Commonwealth v. Harris**, 11 Mass. App. Ct. 165, 170 (1981), the Appeals Court relaxed the requirements for a citizen's arrest where the arrest was made by police officers acting outside their territorial jurisdiction. In **Commonwealth v. Harris**, 11 Mass. App. Ct. 165, 170 (1981), the court noted that applying the "in fact committed" requirement to extraterritorial police officers acting responsibly would not further the purpose of the requirement: "to deter private citizens from irresponsible action." Instead, "rigid compliance" with the citizen's arrest rule in cases involving police officers in jurisdictions other than their own would only "frustrate legitimate law enforcement activities." Therefore, instead of requiring that the felony be "in fact committed," the **Harris** court stated that, to make a citizen's arrest, the officers needed only ***"probable cause to believe that a felony had been committed and that the person arrested had committed it."***

Editor's Note: Unlike the officer in **Commonwealth v. Morrissey**, 422 Mass. 1 (1996), the Brookline officers did not seek or receive authority from Boston police to pursue the defendant. Moreover, there is also no indication that Detectives McNeilly and Crapo were sworn in as special police officers in the city of Boston.

Felony Seizure of Evidence Admissible Where Police Act as Citizen With Probable Cause

In **Commonwealth v. Claiborne**, (1996), the Massachusetts Supreme Judicial Court concluded that the stop of the defendant by Brookline detectives in Boston did not require that evidence obtained as a result of the subsequent arrest and searches be suppressed. Therefore, even though the police were acting as citizens and did not have police powers, they could not only lawfully effect the defendant's arrest on probable cause, but they could also search for and seize incriminating evidence on probable cause.

MVs—The "Automobile Exception"

The Requirement of Exigent Circumstances [Federal]

In **United States v. Ross**, 456 U.S. 798 (1982), the Court strongly implied that "exigent circumstances" may no longer be required for police to justify a warrantless search of a motor vehicle stopped on a public way or found parked there when they have probable cause that the vehicle contains contraband or other evidence to a crime. In **Cardwell v. Lewis**, 417 U.S. 583 (1971) and in **Haefeli v. Chernoff**, 526 F.2d 1314 (1st Cir. 1975), the court held that the exigency requirement was satisfied just by the vehicle being located on a public way or street. In fact, in **Haefeli**, the Court held that exigent circumstances existed justifying the warrantless search of the automobile, even though both suspects had been arrested and the police investigation did not indicate that any confederates might approach and take the vehicle.

Editor's Note: Recently, in **Pennsylvania v. Labron**, 116 S.Ct.____(1996), the United States Supreme Court held that "if a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth AMD permits police to search the vehicle without more." Even if the police department could secure the vehicle and subsequently obtain a search warrant, they are not required to do so. No exigent circumstances need be demonstrated by the police. The Court stated that since there is a reduced expectation of privacy in an automobile due to its pervasive regulation coupled with its ready mobility is itself "an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear."

The Requirement of Exigent Circumstances [Massachusetts]

However, in Massachusetts, exigent circumstances will be required. In **Commonwealth v. Sergienko**, 399 Mass. 29 (1987), the SJC held that there must have existed **at the time** of the seizure exigent circumstances to circumvent the warrant requirement.

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Probable Cause Triggering From Radio Broadcast and Police Observations of Furtive Conduct Inside Vehicle

In **Commonwealth v. Heughan**, 40 Mass. App. Ct. 103 (1996), Boston police officers on routine patrol received a communication dispatch of gunfire occurring outside of the Area B-2 police station. While enroute to the scene of the reported gunfire, a second report of gunfire was reported by communications. The second report occurred within one minute of the first. The officers then headed to the location of the second report, surmizing that the shooters moved to that new location. The officers encountered a brown Toyota some 200 to 300 years from the second location of the reported gunfire. The vehicle was observed speeding at about fifty miles per hour in a thirty miles-per-hour zone. The officer pulled the Toyota over to the side of the roadway. An officer then observed a male occupant in the rear sent bend down out of sight. The officer then approached the driver and requested his license and registration. The operator could produce neither. Police then asked the operator to exit the vehicle. A second officer then noticed an open bottle of beer between the driver and passenger seats. The officer then entered the vehicle and made a cursory search which turned up a black 9 mm. firearm under the driver's seat. The other two occupants were then ordered from the vehicle. Back up officers then entered the passenger compartment of the vehicle and discovered a .22 caliber revolver. The three men were then placed under arrest for unlawful possession of firearms and transported to the police station where they were booked and processed. During a search of their persons occurring inside the police station, police discovered marijuana and crack cocaine on the persons of the defendants.

Editor's Note: The defendants moved to suppress the firearms and the narcotics on the basis that police had no legal justifiable reason to effect the initial search of the passenger compartment which uncovered the 9 mm. firearm under the driver's seat.

Editor's Note on Radio Broadcasts: The Court held that the police did not have either reasonable suspicion or probable cause for the stop of the motor vehicle merely based on the radio broadcasts concerning the gunfire.

Editor's Note on Initial Stop: However, the initial stop of the vehicle was permissible because the police observed a motor vehicle violation—speeding. The Court stated that the police "were duty bound to stop it."

Editor's Note on Probable Cause: After the stop the operator could not produce a license or registration. Additionally, the officers effecting the initial stop of the vehicle observed a passenger in the rear bend down out of sight—a motion, stated the Court, "that reasonably could be taken as placing or retrieving an object beneath the driver's seat. The Court stated that in light of the reported gunfire in the vicinity, "[t]he combination of events and observations ***gave the police officers probable cause*** to think that the [occupants] in the car were engaged in the commission of a crime, unlawful possession of weapons being one of several likely probabilities." Since the police had probable cause, the subsequent search which led to the discovery of the narcotics was permissible. Additionally, a full search of the motor vehicle and its contents would be permissible under the automobile exception rule pursuant to **Commonwealth v. Markou**, 391 Mass. 27 (1984) and **Commonwealth v. Lara**, 39 Mass. App. Ct. 546 (1995).

Scope—Prying Covers Off Dashboard

In **Commonwealth v. Lara**, 39 Mass. App. Ct. 546 (1995), the Court held that the police were "obliged to pry covers off the dashboard to find the incriminating material [narcotics]," under the automobile exception rule.

MVs—Probable Cause Based on Smell of Marijuana

Smell Triggers Probable Cause to Effect Search

In **Commonwealth v. Kitchens**, 40 Mass App. Ct. 591 (1996), police observed a van being operated without a registration plate. The van pulled into a Burger King lot. The officer pulled up behind the van and requested a license and registration from the operator, which he produced. The officer then asked the occupant for his license, which he produced. There were two additional occupants inside the van. While questioning the operator, the officer noticed a "very strong odor of burnt marijuana." The Court held that "the detection of a strong, fresh odor of burnt marijuana emerging from a motor vehicle provided probable cause to search the vehicle."

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MVs—Warrantless Search Back at the Stationhouse

Alternatives Available to Police for Searching Motor Vehicle

If the police can demonstrate that the automobile was stopped on a public way or found parked there and that they have probable cause to believe that the vehicle contains contraband or other evidence of a crime they may:

(1) conduct the search at the scene, or
(2) start the search at the scene, discontinue it and finish it at the stationhouse, or
(3) remove the vehicle entirely from the scene and conduct the search back at the stationhouse

Constitutionally Permissible Back at the Stationhouse

Where police seize a motor vehicle from a public way on probable cause, they may conduct a warrantless search of it back at the stationhouse as long as the search is not long delayed after the initial seizure of the vehicle. In **Carroll v. United States**, 267 U.S. 132 (1925), the United States Supreme Court held that a search warrant is not required where there is probable cause to search an automobile stopped on a highway: an immediate search is constitutionally permissible. Subsequently, in **Chambers v. Maroncy**, 399 U.S. 42 (1970), the United States Supreme Court held that if probable cause to search and exigent circumstances existed when the car was first stopped, the warrantless search would be constitutionally permissible even if it were carried out at the police station.

Exigency Does Not Have to Exist at the Stationhouse—Only at the Time of the Seizure

The element of exigent circumstances does not have to exist at the time of the search at the police station. As long as it exists at the time of the seizure, this element will be satisfied. The element of exigent circumstances will generally be satisfied as long as the motor vehicle is either stopped or found parked on a public way. It will not require the presence of an operator or passengers. The holding of **Chambers** allows the police to conduct a search that could have been done at the scene of the stop in the safety of the police station. It reflects the reality of police work: in some circumstances it may be necessary to delay a search until it can be done in a safe, convenient, and risk-free place. See **Commonwealth v. Markou**, 391 Mass. 27 (1984).

Attendant Risks Justify Procedure

Recently, in **Commonwealth v. Lara**, 39 Mass. App. Ct. 546 (1995), the Massachusetts Appellate Court upheld the seizure of a motor vehicle from a public way and the ensuing warrantless search conducted by police back at the stationhouse. The **Lara** Court looked to both **Chambers** and **Markou** is deciding the case. The Court stated that "[u]nderlying the **Markou** decision is the idea that if a search is constitutionally permissible on the street, with attendant risks (attempts to interfere with the search, exposure to traffic) and awkwardness (tools not at hand, obstruction of traffic), the occupants of the car are no worse off (i.e., suffer no greater intrusion) if the search is continued in the secure setting of the police station."

Weymouth Stationhouse Search of Vehicle Permissible Subsequent to Impoundment

Similarly, in **Commonwealth v. Bongarzone**, 390 Mass. 326 (1983), the Weymouth police impounded a Bronco from a public way where it was discovered containing over twenty pounds of marijuana. The vehicle was then removed to the Weymouth police station where the bags of marijuana were removed and weighed. The entire episode consumed less than two hours. The nonconsensual warrantless seizure was permissible under the automobile exception rule.

MVs—Request of License From Occupants Permissible

Request Requires No Legal Justification

In **Commonwealth v. Kitchens**, 40 Mass App. Ct. 591 (1996), a request made of an occupant of a lawfully stopped vehicle for his or her license amounts to "a routine inquiry that requires no justification."

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MVs—Good Faith Exception Not Available Where Police Commit Error

Error Made by Police

In **Commonwealth v. Censullo**, 40 Mass. App. Ct. 65 (1996), police stopped a motor vehicle on the mistaken belief that the operator had committed a motor vehicle offense. The officer effecting the stop was unaware of a city ordinance modification permitting two way traffic on the street the subject was operating on. With the mistaken belief that the operator was operating the wrong way on a one-way street, the officer effected the stop. As a result of observations made by the officer after the stop, the operator was charged with operating under the influence of liquor. The Commonwealth argued that the initial stop was permissible since the officer has a good faith belief that a motor vehicle violation was occurring in his presence. The Massachusetts Appellate Court held that the good faith exception will not be available where the mistake is made by the police. Conversely, where the mistaken police action is based on a mistake caused by court personnel, the good faith exception will be available.

Error Made by Court Personnel and Not the Police

In **Arizona v. Evans**, 115 S.Ct. 1185 (1995), the United States Supreme Court applied the good faith exception where court personnel were responsible for a mistaken entry on the police computer indicating an outstanding warrant upon which police relied.

MV—Impoundment of Motor Vehicle

Impoundment of Vehicle Where None of the Occupants Can Supply Name of Owner

In **Commonwealth v. Sanchez**, 40 Mass. App. Ct. 411 (1996), the Court held police may lawfully impound a motor vehicle where, subsequent to a valid motor vehicle stop, none of the occupants could supply the name of the owner of the vehicle—even though the vehicle is not reported stolen through NCIC/LEAPS. The Court stated that due to reasons of security and safety, the impoundment was justified.

Towing Vehicles Out of Concern for Liability

In **Commonwealth v. Dunn**, 34 Mass. App. Ct. 702 (1993) the Court held that police may lawfully impound a vehicle where they could reasonably be concerned for their liability in exposing the vehicle to theft or vandalism—as well as the inconvenience to the property owner, if the vehicle were allowed to remain on the open lot. In **Dunn**, at approximately 10:00 p.m. on a Saturday night, the defendant [Dunn], driving in his pick-up truck, was stopped by the Southwick police for speeding. Instead of stopping his pickup on the side of the roadway, the defendant pulled his vehicle into the parking lot of a closed business, Computer, Inc., stopping it in a location that would not interfere with other vehicles entering or exiting from the parking lot. The defendant was arrested for OUI and transported to the station. One officer remained with the defendant's vehicle, called a tow truck to impound it, and searched the vehicle pursuant to a Southwick police regulation that called for an inventory search "where the operator is arrested or the vehicle towed or removed." In the driver's door pocket, the officer discovered a plastic bag containing marijuana and a smoking pipe. The defendant was subsequently charged with possession of 94C. The defendant filed a motion to suppress the evidence seized during the search of his truck. In effect, the defendant argued that the police had no right to impound his vehicle from the private parking lot of the closed business. The Court held that the police actions were proper and that the evidence was admissible pursuant to their police inventory policy.

Inventory of Impounded Vehicles

Additionally, in **Commonwealth v. Sanchez**, 40 Mass. App. Ct. 411 (1996), subsequent to the impoundment, the police conducted a motor vehicle inventory while awaiting the arrival of the tow truck at the scene of the stop. The police discovered cocaine in the pocket of a jacket drapped over the driver's seat. Since their inventory policy was containerized, the procedure was permissible.

Reasonable Alternative Arrangements to Move Vehicle

An argument that has recently been made in Massachusetts is whether under the State Constitution the police must have

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written guidelines stating the circumstances in which an inventory search may be undertaken and thus restricting the exercise of police discretion. In **Commonwealth v. Caceres**, 413 Mass. 749 (1992), the defendant argued that the police should have allowed him to make an alternative arrangement to have the vehicle removed, either by having a passenger or friend remove the vehicle [and not the police]. Without expressly stating whether such an obligation on the police to do so before an inventory search can be deemed reasonable, footnotes #1 and #2 of the **Caceres** decision seem to indicate that the Massachusetts Supreme Judicial Court is leaning in that direction. Footnote #1 states that "[i]t would seem reasonably clear that the failure to give a person an opportunity to make reasonable alternative arrangements for the vehicle would not invalidate an inventory search under Fourth Amendment principles. [**Editor's note:** An article 14 argument may have a different outcome]. However, some State courts have indicated that the police must respond to a reasonable request for an alternative disposition of the vehicle." Similarly, in footnote #2, the Court cites with approval 3 ***W.R. LaFave, Search and Seizure*** § 7.3(c), @ 92 (2d ed. 1987), "if the driver asks that his car be turned over to a passenger, this should be done if the passenger is not under arrest or otherwise incapacitated and displays a valid operator's license." In addition, the SJC stated in the same footnote that "[a]t least, if the owner of the vehicle is present ***and*** makes such a proposal, ***this principle seems appropriate.***" The SOP at issue in **Caceres** stated that no inventory is to be taken:

(1) if the vehicle is legally parked and locked,
(2) removed by a third party,
(3) disabled and towed at the owner's or operator's request, or
(4) special conditions requiring prompt removal prevent the taking of an inventory before the vehicle is removed

No Reasonable Alternative Where Owner Unknown

In **Commonwealth v. Sanchez**, 40 Mass. App. Ct. 411 (1996), discussed above, since the owner of the vehicle was not identified, no reasonable alternative short of impoundment was available.

MVs—Police Failure to Notify Bail Magistrate Not a Violation of C. 263 § 5A

OUI Arrestee Must Affirmatively Invoke C. 263 § 5A

In **Commonwealth v. Christolini**, 422 Mass. 854 (1996), the police failed to notify the bail magistrate of an OUI arrest for approximately four hours. It was the policy of the Westfield police department to telephone the bail magistrate once every four hours. During the booking procedure, the defendant was informed of his rights pursuant to c. 263 § 5A. However, he did not affirmatively invoke them. The Massachusetts Supreme Judicial Court held that where an OUI-arrestee does not affirmatively invoke his rights to an independent medical examination pursuant to c. 263 § 5A, police failure to notify the bail magistrate within four hours of the arrest does not violate the statute.

Editor's Note on Imparting C. 263 § 5A: Whenever a person is placed in custody at a police station or other place of detention for operating under the influence of alcohol [and not drugs], he or she shall have the right, at his or her expense, to be examined immediately by a physician selected by him or her. This right shall be imparted to the arrestee by the police official in charge of the stationhouse or the booking officer immediately upon being booked. G.L. c. 263 § 5A. ***There shall be both oral and written notification.*** The arrestee shall be given a reasonable opportunity to exercise this right [by allowing access to telephone]. ***G.L. c. 263 § 5A states that:***

> "A person held in custody at a police station or other place of detention, charged with operating a motor vehicle while under the influence of intoxicating liquor, shall have the right, ***at his request and at his expense, to be examined immediately by a physician selected by him.*** The police official in charge of such station or place of detention, or his designees, shall inform him of such right immediately upon being booked, and shall afford him a reasonable opportunity to exercise it. Such person shall, immediately upon being booked, be given a copy of this section unless such a copy is posted in the police station or other place of detention in a conspicuous place to which such person has access." [emphsis added].

Arrestees Admitted to Bail Must Understand Nature and Conditions of Bail

In **Commonwealth v. Christolini**, 422 Mass. 854 (1996), the Massachusetts Supreme Judicial Court addressed Rule 28 of the Superior Court Rules Governing Persons Authorized to Take Bail. The Court stated that "it requires that persons admitted to bail understand the nature of bail and any conditions of release." Intoxication could impair the arrestee's

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understanding of the bail proceeding, and could therefore, by a justifiable basis for extending the reasonable time delay before police must call or allow a defendant to call a bail magistrate.

Police May Decide to Delay Bail Hearing Due to Intoxication

In **Commonwealth v. Christolini**, 422 Mass. 854 (1996), the Massachusetts Supreme Judicial Court stated that the police themselves may make the determination whether the arrestee is intoxicated and unable to understand the nature and conditions of bail, therefore delaying the bail hearing. The Court stated that police departments often videotape booking procedures, which will give the judiciary ample basis to review subsequently a police determination as to the arrestee's intoxication.

Editor's Note: For these reasons, all police booking procedures should be subject to videotape.

Bail Hearing Delayed by Bail Magistrate

In **Commonwealth v. Finelli**, 422 Mass. 860 (1996), the OUI arrestee also received his rights pursuant to c. 263 § 5A but failed to affirmatively invoke them. He then agreed to take a breathalyzer examination where a reading of .14 was obtained. Police then telephoned the bail magistrate and explained to him that the defendant was intoxicated with a reading of .14. The bail magistrate told the officer to let the defendant "sleep it off" for five and half hours. At the end of that period, the bail magistrate came to the station and admitted the defendant to bail on personal recognizance.

Campus Police—Limited Powers of Arrest

Intro

Recently, in **Commonwealth v. Mullen**, 40 Mass. App. Ct. 404 (1996), the Massachusetts court of appeals severely restricted a campus police officer from effecting an arrest which developed from an initial motor vehicle stop—even if the motor vehicle stop was effected on a roadway running through the campus. In **Mullen**, a campus police officer from Fitchburg State College, observed a vehicle pull out of a street maintained by the college. This vehicle almost collided with the officer. The officer then turned his cruiser around and effected a stop of this vehicle. The operator was then placed under arrest for OUI.

The campus police officer stopped the defendant for failure to yield at an intersection, a civil motor vehicle infraction punishable only by a thirty-five dollar fine. G. L. c. 89, § 8. It is not an arrestable offense. **Commonwealth v. Zorilla**, 38 Mass. App. Ct. 77, 79 (1995). At the time he stopped the defendant, the campus police officer did not have reason to suspect that the defendant had committed an arrestable offense. It was only after the officer stopped the defendant and made observations concerning his sobriety that he discovered grounds to arrest the defendant for the arrestable offense of operating a motor vehicle under the influence of alcohol.

The SJC concluded that the campus police officer did not have authority to stop the defendant for a civil motor vehicle violation, therefore, the subsequent warrantless arrest cannot be justified by observations made following the stop.

Statutory Limitations on Campus Police Powers—c. 22C § 63

General Laws c. 22C, § 63, does not confer upon campus security staff all the powers of the State police officer appointed pursuant to c. 22C, § 10. On its face, G. L. c. 22C, § 63, confers upon those appointed thereunder by the colonel of the Massachusetts State police as special State police officers only "the same power to make arrests as regular police officers for any criminal offense committed in or upon lands or structures owned, used or occupied by such college."

Silence as to Motor Vehicle Powers

The statutory provisions of c. 22C, §§ 56 through 68, are all silent as to the authority, if any, of special State police officers appointed thereunder to enforce the civil motor vehicle laws on public ways within their respective jurisdictions.

Editor's Note: However, c. 90C, § 1 defines "police officer" narrowly to include "any officer . . . authorized to make arrest or serve criminal process, any person appointed by the registrar under section twenty-nine of chapter

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ninety, any person appointed by the trustees of the University of Massachusetts under section thirty-two A of chapter seventy-five, any person appointed by the trustees of Southeastern Massachusetts university under section seventeen of chapter seventy-five B ***and any person appointed by the colonel of state police under section fifty-nine of chapter twenty-two C."***

Legal Procedures for Motor Vehicle Offenses

General Laws c. 90C details the procedures to be employed with regard to motor vehicle offenses. It is c. 90C, § 2, which authorizes a police officer to stop a motorist in order to issue a citation for automobile law violations. This section provides that "any police officer assigned to traffic enforcement duty" shall record the violation upon a citation. Section 3 provides that "If a police officer observes . . . the occurrence of a civil motor vehicle infraction, the officer may issue a written warning or may cite the violator for a civil motor vehicle infraction. . . ." To do so, the police officer must, of course, in many instances first stop the offender.

Definition of Police Officer

However, c. 90C, § 1 defines "police officer" narrowly to include "any officer . . . authorized to make arrest or serve criminal process, any person appointed by the registrar under section twenty-nine of chapter ninety, any person appointed by the trustees of the University of Massachusetts under section thirty-two A of chapter seventy-five, any person appointed by the trustees of Southeastern Massachusetts university under section seventeen of chapter seventy-five B ***and any person appointed by the colonel of state police under section fifty-nine of chapter twenty-two C."***

While virtually all special State police officers are empowered by c. 22C, §§ 56 through 68, to "make arrest" and/or "serve criminal process," we do not read c. 90, § 1, to encompass all such special State police officers within the definition of "police officer." Were this so, it would have been redundant and unnecessary for c. 90, § 1, expressly to include within the definition of "police officer" only those special State police officers appointed under c. 22C, § 59. Accordingly, we conclude that campus police officers, ***unlike those employed*** by the Department of Mental Health or Mental Retardation under c. 22C, § 59, ***are not empowered under c. 90C, § 2, to stop motorists for automobile law violations on public ways within their jurisdiction.***

1996/97 Statutory Updates & Statutes of Interest

C. 268 § 32B Resisting Arrest With a Police Officer

Recently, the Massachusetts Legislature enacted a statute making it a crime for a person to either resist or interfere with an arrest. Although the enactment does not carry a statutory power of arrest, police may effect an arrest if they can articulate a breach of the peace. *The statute reads:*

"A person commits the crime of resisting arrest if he knowingly prevents or attempts to prevent a police officer, acting under color of his official authority, from effecting an arrest of the actor or another by:

1) using or threatening to use physical force or violence against the police officer or another
or
1) using any other means which creates a substantial risk of causing bodily injury to such police officer or another"

Editor's Note on Breach of the Peace: It appears that if any of the above elements are satisfied, a breach of the peace has occurred. Conduct of "threatening to use or using physical force or violence" against a police officer is clearly a breach of the peace. Additionally, conduct which "creates a substantial risk of causing bodily injury" can easily be articulated that a breach of the peace has in fact occurred. Remember, that the crimes of assault, assault and battery, and assault and battery on a public official do not carry statutory powers of arrest, yet, police arrest for them every day ***because they are breaches of the peace.***

Attorney General's Newsletter—Power of Arrest for Resisting Arrest Based on a Breach of the Peace

In the Attorney General's newsletter of March 1996, it states that "[a]lthough the statute does not so provide, police officers are empowered to arrest individuals who are committing misdemeanors, including a breach of the peace, in their

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presence. Therefore, because resisting arrest under the new statute is a misdemeanor, which by the very nature of the crime would always be committed in the officer's presence, the officer can arrest any individual, including a third party or bystander, without a warrant, for a violation of the new law."

C. 90 § 34P. Seizure of Registration Plates from Public or Private Property

The registrar after receipt of a notice as referred to in section thirty-four H, that a motor vehicle which is subject to the provisions of section one A and for which a motor vehicle liability policy or bond or deposit required by the provisions of this chapter has not been provided and maintained in accordance therewith, and upon the effective date of revocation pursuant to said section thirty-four H, shall notify state law enforcement agencies and the municipal police department of the city or town of principal garaging of said motor vehicle of such failure to provide and maintain said policy or bond or deposit. Further, such notice shall include the name and address of the owner of the motor vehicle and the address of the principal place of garaging.

State law enforcement personnel or the police of the city or town in which such motor vehicle is so garaged shall, upon receipt of said notice from the registrar seize the registration plates in use on said motor vehicle or when said registration plates are affixed to any vehicle or are in the possession or custody of any individual ***whether on a public way or private property*** and return them forthwith, unless the owner shall present a notice of reinstatement from the insurer or evidence of a new motor vehicle insurance policy dated at least two days prior to the effective date of revocation pursuant to section thirty-four H; provided, however, that municipal law enforcement agencies shall have the primary authority and responsibility to seize revoked registration plates within the limits of their jurisdiction; and, provided further, that no provision of this section shall prevent a state law enforcement official from seizing a revoked registration plate when in the performance of his duties.

C. 266 §§ 14, 15 Burglary—Victim's Spouse

The offense of burglary requires that the defendant have no right of habitation or occupancy in the premises at the time of the entry. The following factors should be used by the police when confronted with a situation where a defendant has broken into the dwelling of his or her spouse:

- the marital status of the parties
- the existence of any outstanding orders against the defendant [example: 209A]
- extended period of separation
- names on leases or documents of title
- any acknowledgements made by the defendant that he has no right to enter

C. 266 § 20 Larceny in a Building

Where a defendant steals goods from a store open for business, the proper charge will be either straight larceny pursuant to c. 266 § 30 or shoplifting under c. 266 § 30A, depending on the circumstances. It will not amount to larceny in a building under c. 266 § 20 since an element of that statute requires that the larceny be "from" the building. The longstanding caselaw in this Commonwealth requires that the stolen property be under the watch of the building, placed there for safekeeping, and not under the eye or personal care of some one in the building. **Commonwealth v. Sollivan,** 40 Mass. App. Ct. 284 (1996).

C. 266 § 37 Larceny by Check

In **Commonwealth v. Adelson,** 40 Mass. App. Ct. 585 (1996), the defendant could lawfully be convicted of the crime of larceny by check where he contacted an out of state vendor by telephone and had goods delivered to him in Massachusetts by mailing out a check intentionally written with insufficient funds.

C. 269 § 10 Dangerous Weapons—Ocean Not a Dangerous Weapon

In **Commonwealth v. Shea,** 38 Mass. App. Ct. 7 (1995), the Massachusetts Court of Appeals held that the ocean could not be a dangerous weapon. General Laws c. 265 § 15A, *reads, in pertinent part:*

"Whoever commits assault and battery upon another by means of a dangerous weapon shall be punished . . . ."

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In **Shea**, the Court stated that "[a]lthough the ocean can be and often is dangerous, it cannot be regarded in its natural state as a weapon within the meaning of 15A. They stated that the term "dangerous weapon" comprehends "any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm." The cases in Massachusetts which discuss the definition share a common fact that is consistent with the definitions of "dangerous weapons" which speak in terms of "objects" or "instrumentalities." The commonality found in those cases is that the object in issue, whether dangerous per se or as used, was an instrumentality which the batterer controlled, either through possession of or authority over it, for use of it in the intentional application of force. Because the ocean in its natural state cannot be possessed or controlled, ***it is not an object or instrumentality capable of use as a weapon for purposes of 15A.***

C. 269 § 14A Harassing Telephone Calls—3 Calls Required

In **Commonwealth v. Wotan**, 422 Mass. 740 (1996), the Court held that "telephoning another person repeatedly, for the sole purpose of harassing, annoying or molesting such person or his family" requires proof of at least three telephone calls.

C. 272 §§ 35, 53 Lewd, Wanton & Lacivious Person—Public Place Element

In **Commonwealth v. Nicholas**, 40 Mass. App. Ct. 255 (1996), the defendant was arrested for being a lewd person and for committing unnatural and lacivious acts with another adult. The sexual acts were performed at dusk down a path approximately 100 feet from a rest area off of Route 95. The Court held that based on these facts, the defendant could not be convicted. For the area to qualify as public, as that term is required under the statutes, there must be a liklihood of being observed and that it was reasonably forseeable. The Court found that the place chosen to perform these acts was not likly to be used by others.

C. 272 § 53 Disorderly Person to wit: Peeping Tom

In **Commonwealth v. LePore**, (1996), the Court held that where a defendant peered inside of a window, he could lawfully be convicted of being a disorderly person to wit a Peeping Tom, even where the victim was asleep at the time of the surreptitious spying.

In **LePore**, the defendant argued that he could not be lawfully convicted of being a disorderly person because the victim, who was asleep, never knew he was there. Conduct that is disorderly by reason of its physically offensive nature ***does not, however, require that the object of the offensive conduct be aware of it.*** Acting the "Peeping Tom" offends and results in disorder by invading the privacy of persons precisely where they are most entitled to feel secure—where they live and rest. The transgression is completed by the violation of privacy just as a trespass may be completed even though the owner of property may not at the time of invasion have known of the presence of the trespasser on her property. LePore's conduct caused public inconvenience or alarm ***in that it occurred in a public alley.***

> **Editor's Note on "Peeping Tom"**—The term is an allusion to the Peeping Tom of Coventry, who popped out his head as the naked Lady Godiva passed, and was struck blind for it. Oxford English Dictionary 2113 (Compact ed. 1971). American Heritage Dictionary 1335 (3d ed. 1992).

Editor's Note on Voyeurism: The Court stated that "[a]n equation between voyeurism and disorderly conduct (i.e., being a disorderly person) is not self-evident. Voyeurism, in a dictionary sense and as used in the cases, connotes sexually offensive conduct, the idea apparently being that a man is unlikely to peer through somebody's window to size up the furniture. American Heritage Dictionary 2004 (3d ed. 1992). Disorderly conduct, as interpreted in **Alegata v. Commonwealth**, 353 Mass. at 303-304, "is not primarily, if at all, directed at offensive sexual conduct," but, rather, at intentional conduct that "disturb[s] the public tranquility, or alarm[s] or provoke[s] others." To be disorderly, within the sense of the statute, the conduct must disturb through acts other than speech; neither a provocative nor a foul mouth transgresses the statute. Compare **Commonwealth v. Richards**, 369 Mass. 443,447-448 (1976), in which the defendants punched police officers, who were making an arrest, and attracted an unruly crowd.

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Statutes of Interest: The Law on Firearms in Massachusetts

C. 140 § 121 Definitions of Firearms

In section one hundred and twenty-two to one hundred and thirty-one F, inclusive, "firearm" shall mean a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel is less than sixteen inches or eighteen inches in the case of a shotgun as originally manufactured, and the term "length of barrel" shall mean that portion of a firearm, rifle, shotgun or machine gun through which a shot or bullet is driven, guided or stabilized, ***and shall include the chamber.***

■Sawed-Off Shotgun

■A "sawed-off shotgun" shall mean any weapon made from a shotgun whether by alteration, modification or otherwise, if such a weapon, as modified has one or more barrels less than eighteen inches in length or a modified has an overall length of less than twenty-six inches.

■Imitation Firearm

■An "imitation firearm" shall mean any weapon which is designed, manufactured or altered in such a way as to render it in capable of discharging a shot or bullet.

■Rifle

■A "rifle" is a weapon having a rifled bore with a barrel length equal to or greater than sixteen inches, capable of discharging a shot or bullet for each pull of the trigger.

■Shotgun

■A "shotgun" is a weapon having a smooth bore with a barrel length equal to or greater than eighteen inches with an overall length equal to or greater than twenty-six inches, capable of discharging a shot or bullet for each pull of the trigger.

■Ammunition

■"Ammunition" shall mean cartridges or cartridge cases, primers (igniter), bullets or propellant powder designed for use in any firearm, rifle or shotgun. The term "ammunition" shall also mean tear gas cartridges, chemical mace or any device or instrument which contains or emits a liquid, gas, powder or any other substance designed to incapacitate.

C. 140 § 129B Firearm Identification Card; Disqualification of Applicants

Entitlement to FID [exceptions]

Any person residing or having a place of business within the jurisdiction of the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to the licensing authority application for a firearm identification card, ***which such person shall be entitled to, unless the applicant:***

(a) has within the last five years been convicted of a felony in any state or federal jurisdiction, or within that period has been released from confinement where such person was serving a sentence for a felony conviction, or
(b) has been confined to any hospital or institution for **mental illness**, except where the applicant shall submit with the application an affidavit of a registered physician that he is familiar with the applicant's history of mental illness and that in his opinion the applicant is not disabled by such illness in a manner which should prevent his possessing a firearm, rifle or shotgun, or
(c) has within the last five years been convicted of a violation of any state or federal narcotic or harmful drug law, or within that period has been released from confinement for such a conviction; or is or has been under treatment for or confinement for drug addiction or habitual drunkenness, except when he is deemed to be cured of such condition by a registered physician, he may make application for said card after the expiration of five years from the date of such confinement or treatment and upon presentation of an affidavit issued by said physician to the effect that the physician knows the applicant's history of treatment and that in his opinion the applicant is deemed cured, or
(d) is at the time of the application under the age of fifteen, or
(e) is at the time of the application fifteen years of age or over but under the age of eighteen, except where the applicant submits with his application a certificate of his parent or guardian granting the applicant permission to apply for a card, or
(f) is an alien, or
(g) is currently the subject of an order issued pursuant to Section Three B of Chapter Two Hundred and Nine A

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The licensing authority may not prescribe any other condition for the issuance of a card and it shall within thirty days from the date of application either approve the application and issue the card or deny the application and notify the applicant of the reason for such denial in writing. Pending issuance of the card, a receipt for the fee paid shall, after five days from issuance, serve as a valid substitute, unless the applicant is disqualified. Written notice of denial of the application shall void the receipt and require its immediate surrender. A card may be revoked by the licensing authority or his delegate or suspended for such period as he may set, only upon the occurrence of any event which would have disqualified the holder from being issued the card. Any suspension or revocation of a card shall be in writing and shall state the reason therefor. Upon revocation or suspension, the licensing authority shall take possession of said card and receipt for fee paid for such card unless a hearing has previously been held pursuant to Section Three B of Chapter Two Hundred and Nine A.

Judicial Review

Any applicant or holder aggrieved by a denial, revocation or suspension of a card may within ninety days after receipt of notice appeal to the district court for a review of such action.

Forms

Said card shall be in a form prescribed by the commissioner and shall contain an identification number, the name and address of the holder, his place and date of birth, his height, weight, and hair and eye color, and his signature and shall be captioned "Firearm Identification Card". The application for a card shall be made in multiple on a form prescribed by the commissioner which shall require the applicant affirmatively to state that he is not disqualified for any of the foregoing reasons from possession of a card.

Validity

Said card shall be valid until revoked or suspended. The fee for an application and card shall be two dollars which shall be payable to the licensing authority and shall not be prorated or refunded in case of revocation or denial. The card holder shall notify, in writing, both the issuing authority and the commissioner of public safety of any change in his address. Such notification shall be made within thirty days of its occurrence.

Upon receipt of an application for a card, the licensing authority shall forward a copy of such application to the commissioner of public safety, who shall within twenty-one days advise in writing of any disqualifying criminal record, if any, of the applicant and whether there is reason to believe that the applicant is disqualified for any of the foregoing reasons from possessing a card. The licensing authority, when in doubt about the validity of the applicant's negative or positive statement relative to past hospitalization for mental disorder, may also make inquiries concerning the applicant to the department of mental health for the purpose of determining eligibility for the firearm identification card and shall receive prompt and full cooperation from such department for that purpose in any investigation of the applicant.

C. 140 § 129C Firearm Identification Card:Restrictions on Possession—Important Exemptions

No person, other than a licensed dealer or one who has been issued a license to carry a pistol or revolver or an exempt person as hereinafter described, shall own or possess any firearm, rifle, shotgun or ammunition unless he has been issued a firearm identification card by the licensing authority pursuant to the provisions of section one hundred and twenty-nine B.

No person shall sell, give away, loan or otherwise transfer a rifle or shotgun or ammunition other than:

(a) by operation of law, or
(b) to an exempt person as hereinafter described, or
(c) to a licensed dealer, or
(d) to a person who displays his firearm identification card, or license to carry a pistol or revolver.

A seller shall, ***within seven days,*** report all such transfers to the commissioner of public safety according to the provisions set forth in section one hundred and twenty-eight A, and in the case of loss, theft or recovery of any firearm, rifle, shotgun or machine gun, a similar report shall be made forthwith to both the commissioner and the licensing authority in the city or town where the owner resides.

The provisions of this section shall not apply to the following exempted persons and uses:

(a) Any device used exclusively for signalling or distress use and required or recommended by the United States Coast

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Guard or the Interstate Commerce Commission, or for the firing of stud cartridges, explosive rivets or similar industrial ammunition;

(b) Federally licensed firearms manufacturers or wholesale dealers, or persons employed by them or by licensed dealers, or on their behalf, when possession of firearms, rifles or shotguns is necessary for manufacture, display, storage, transport, installation, inspection or testing;

(c) To a person voluntarily surrendering a firearm, rifle or shotgun and ammunition therefor to a licensing authority, the commissioner or his designee if prior written notice has been given by said person to the licensing authority or the commissioner, stating the place and approximate time of said surrender;

(d) The regular and ordinary transport of firearms, rifles or shotguns as merchandise by any common carrier;

(e) Possession by retail customers for the purpose of firing at duly licensed target concessions at amusement parks, piers and similar locations, provided that the firearms, rifles or shotguns to be so used are firmly chained or affixed to the counter and that the proprietor is in possession of a firearm identification card or license to carry firearms;

(f) Possession of rifles and shotguns and ammunition therefor by nonresident hunters with valid nonresident hunting licenses during hunting season;

(g) Possession of rifles and shotguns and ammunition therefor by nonresidents while on a firing or shooting range;

(h) Possession of rifles and shotguns and ammunition therefor by nonresidents traveling in or through the commonwealth, providing that any rifles or shotguns are unloaded and enclosed in a case;

(i) Possession of rifles and shotguns by nonresidents while at a firearm showing or display organized by a regularly existing gun collectors' club or association;

(j) Any new resident moving into the commonwealth, or any resident of the commonwealth upon being released from active service with any of the armed services of the United States with respect to any firearm, rifle or shotgun and ammunition therefor then in his possession, for sixty days after such release or after the time he moves into the commonwealth;

(k) Any person under the age of fifteen with respect to the use of a rifle or shotgun by such person in hunting or target shooting, provided that such use is otherwise permitted by law and is under the immediate supervision of a person holding a firearm identification card or a license to carry firearms, or a duly commissioned officer, noncommissioned officer or enlisted member of the United States Army, Navy, Marine Corps, Air Force or Coast Guard, or the National Guard or military service of the commonwealth or reserve components thereof, while in the performance of his duty;

(l) The possession or utilization of any rifle or shotgun during the course of any television, movie, stage or other similar theatrical production, or by a professional photographer or writer for examination purposes in the pursuit of his profession, providing such possession or utilization is under the immediate supervision of a holder of a firearm identification card or a license to carry firearms;

(m) The temporary holding, handling or firing of a firearm for examination, trial or instruction in the presence of a holder of a license to carry firearms, or the temporary holding, handling or firing of a rifle or shotgun for examination, trial or instruction in the presence of a holder of a firearm identification card, or where such holding, handling or firing is for a lawful purpose;

(n) The transfer of a firearm, rifle or shotgun upon the death of an owner to his heir or legatee shall be subject to the provisions of this section, provided that said heir or legatee shall within one hundred and eighty days of such transfer, obtain a firearm identification card or a license to carry firearms if not otherwise an exempt person who is qualified to receive such or apply to the licensing authority for such further limited period as may be necessary for the disposition of such firearm, rifle or shotgun;

(o) Persons in the military or other service of any state or of the United States, and police officers and other peace officers of any jurisdiction, in the performance of their official duty or when duly authorized to possess them;

(p) Carrying or possession by nonresidents of so-called black powder rifles, shotguns, and ammunition therefor as described in such paragraphs (A) and (B) of the third paragraph of section 121, and the carrying or possession of conventional rifles, shotguns, and ammunition therefor by nonresidents who meet the requirements for such carrying or possession in the state in which they reside.

(q) Any nonresident who is eighteen years of age or older when acquiring a rifle, shotgun or ammunition from a licensed firearms dealer, provided that such nonresident is in compliance with the law of the state where he resides and has the proper firearms license if required.

(r) Possession by a veteran's organization chartered by the Congress of the United States or included in clause (12) of section five of chapter forty and possession by the members of any such organizations when on official parade duty or ceremonial occasions;

(s) Possession by federal, state and local historical societies, museums, and institutional collections open to the public, provided such firearms, rifles or shotguns are unloaded, properly housed and secured from unauthorized handling;

(t) the possession of firearms, rifles, shotguns, machine guns and ammunition, by banks or institutional lenders, or their agents, servants or employees, when the same are possessed as collateral for a secured commercial transaction or as a

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result of a default under a secured commercial transaction.

Any person, exempted by clauses (o), (p) and (q), purchasing a rifle or shotgun or ammunition therefor shall submit to the seller such full and clear proof of identification, including shield number, serial number, military or governmental order or authorization, military or other official identification, other state firearms license, or proof of nonresidence, as may be applicable.

Firearms, Rifles, Shotguns, and Ammunition Not to be Sold to Minors

Nothing in this section shall permit the sale of rifles or shotguns or ammunition therefor to a minor under the age of eighteen in violation of section one hundred and thirty nor may any firearm be sold to a minor nor to any person who is not licensed to carry firearms under section one hundred and thirty-one unless he presents a valid firearm identification card and a permit to purchase issued under section one hundred and thirty-one A, or presents such permit to purchase and is a properly documented exempt person as hereinbefore described.

The possession of a firearm identification card issued under section one hundred and twenty-nine B shall not entitle any person to carry a firearm in violation of section ten of chapter two hundred and sixty-nine.

Demand by Police of Identity and Licensing

Any person who, while not being within the limits of his own property or residence, or such person whose property or residence is under lawful search, and who is not exempt under this section, shall on demand of a police officer or other law enforcement officer, exhibit his license to carry firearms, or his firearm identification card or receipt for fee paid for such card, or, after January first, nineteen hundred and seventy, exhibit a valid hunting license issued to him which shall bear the number officially inscribed of such license to carry or card if any. Upon failure to do so such person may be required to surrender to such officer said firearm, rifle or shotgun which shall be taken into custody as under the provisions of section one hundred and twenty-nine D, except that such firearm, rifle or shotgun shall be returned forthwith upon presentation within thirty days of said license to carry firearms, firearm identification card or receipt for fee paid for such card or hunting license as hereinbefore described. Any person subject to the conditions of this paragraph may, even though no firearm, rifle or shotgun was surrendered, be required to produce within thirty days said license to carry firearms, firearm identification card or receipt for fee paid for such card, or said hunting license, failing which the conditions of section one hundred and twenty-nine D will apply. Nothing in this section shall prevent any person from being prosecuted for any violation of this chapter.

C. 140 § 131 License to Carry Pistol

Application

The chief of police or the board or officer having control of the police in a city or town, or the commissioner of public safety, hereinafter referred to as the commissioner, or persons authorized by them, respectively, ***shall upon request from a person residing or having a place of business within their respective jurisdiction,*** give an application for a license to carry firearms to such person. Said chief, board, officer or anyone authorized by them, respectively, shall within seven days of receipt of a completed application for such license, forward one copy of said applicant's fingerprints to said commissioner, who shall, within thirty days, advise, in writing, the licensing authority of the criminal record, if any, of the applicant.

Inquiry as to Mental Condition of Applicant

The licensing authority shall, when it has a reasonable belief that the applicant may have a history of mental, psychiatric or psychological illness which may affect his suitability to carry or possess a firearm, also make an inquiry concerning the applicant to the department of mental health within seven days of receipt of a completed application for such license. The commissioner of the department of mental health shall respond to a licensing authority within thirty days of receipt of an inquiry stating that based upon the information held by the department of mental health that the applicant is a suitable person to be licensed to possess or carry a firearm or is not a suitable person to be licensed to possess a firearm license.

Qualifications to be Issued Permit:

After such investigation has been completed, said chief, board, officer, commissioner of public safety, or anyone authorized by them, respectively, may, issue to a person residing or having a place of business within their respective jurisdiction, a license to carry firearms in the commonwealth if it appears that the applicant is a suitable person to be so licensed, and that the applicant has good reason to fear injury to his or her person or property, or for any other proper purpose, including the carrying of firearms for use in target practice only, ***except the following:***

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1) an alien whose license to carry firearms may only be issued under the provisions of section one hundred and thirty-one F
2) a person who has been convicted of a felony or
3) the unlawful use, possession or sale of a narcotic or harmful drugs
4) a person who is currently the subject of an order issued pursuant to c. 209A § 3B
5) or a minor ***under the age of eighteen***

Notification of Denial
An applicant for a license or a renewal of a license under this section shall be notified by the licensing authority, in writing, within forty days of submitting said application, of either approval or denial and in the case of denial, such notice shall state the reasons thereof.

Judicial Review
Any person denied a license or a renewal of a license under this section, or any person who has not received a reply from the licensing authority within forty days of submitting said application, may, within either forty-five days of receiving notification of denial or within forty-five days after the expiration of the time limit in which the licensing authority is required to respond to the applicant, file a petition to obtain judicial review in the district court having jurisdiction in the city or town wherein the applicant filed for said license; and a justice of said court, after, having heard all of the facts, may direct that a license be issued the applicant, if he finds that there was no reasonable ground for refusing such license and that the applicant was not prohibited by law from holding the same.

Intentional False Answers
Any person who files an application with any intentional false answer to the questions on the application shall be punished by a fine of not less than five hundred nor more than one thousand dollars and by imprisonment for not less than six months nor more than two years in a jail or house of correction. [no statutory right of arrest].

Duration of LTC
A license issued to carry a firearm shall be for a period of five years, expiring on the anniversary of the applicant's date of birth occurring not less than four years but not more than five years from the date of issue. Any renewal thereof shall expire on the anniversary of the applicant's date of birth occurring not less than four years but not more than five years after the effective date of such license. Any license issued to an applicant born on February twenty-ninth, for the purpose of this section, shall expire on March first.

90 Day Grace Period
For the purposes of the provisions of section ten of chapter two hundred and sixty-nine, an expired license to carry firearms shall be deemed to be valid for a period not to exceed ninety days beyond the date of expiration, except that this provision shall not apply to any such license to carry firearms which has been revoked or relative to which revocation is pending.

The Fee
The fee for such license or a renewal of a license shall be ten dollars, and shall be payable in a manner prescribed by the licensing authority or commissioner of public safety and shall not be prorated or refunded in case of revocation. Notwithstanding other provisions of this section, no license shall be required for the possession or carrying of a firearm known as a detonator and commonly used on motor vehicles as a signaling and marking device, when carried or possessed for such signaling and marking purposes.

Violation
Whoever, knowingly, issues a license in violation of this section shall be punished by a fine of not less than five hundred nor more than one thousand dollars and by imprisonment for not less than six months nor more than two years in a jail or house of correction. [no statutory right of arrest.]

Judicial Review Upon Revocation
Any person whose license is so revoked, may within forty-five days of notification of said revocation, file a petition to obtain judicial review in the district court having jurisdiction in the city or town wherein the applicant held said license, and a justice of said court, after having heard all of the facts, may direct the license be reinstated if he finds that there was no reasonable ground for revoking said license.

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No person shall be issued a license to carry or possess a machine gun in the commonwealth, except that a licensing authority may issue a machine gun license to:

(a) a firearm instructor certified by the criminal justice training council for the sole purpose of firearm instruction to police personnel;
(b) a bona fide collector of firearms upon application or upon application for renewal of such license.

C. 140 § 131C Carrying Firearm in Vehicle; Penalty

Elements of the Statute
1) no person carrying a firearm or firearms under a license issued under section one hundred and thirty-one, or one hundred and thirty-one F
2) shall carry the same in a vehicle
3) unless such firearm or firearms while so carried therein is under the direct control of such person

Penalty [fine]
Whoever violates the foregoing ***shall be punished by a fine of not more than one hundred dollars.*** A conviction of a violation of this section shall be reported forthwith by the court or magistrate to the authority who issued the license who shall immediately revoke the license of the person so convicted. No new license under said section shall be issued to any such person until one year after the date of revocation. There is no statutory right of arrest.

C. 140 § 131F 1/2 Temporary License to Carry During Certain Productions

Notwithstanding the provisions of subsection (a) of section ten of chapter two hundred and sixty-nine of the General Laws or any other law to the contrary, the carrying or possession of a firearm and blank ammunition therefor, during the course of any television, movie, stage or other similar theatrical production, by a person within such production, shall be authorized; provided, however, that such carrying or possession of such firearm shall be under the immediate supervision of a person licensed to carry firearms.

C. 140 § 131F Temporary License to Carry Firearms Issued to Non-Residents, etc.

A temporary license to carry firearms, or ammunition therefor, within the commonwealth, may be issued by the commissioner of public safety, or persons authorized by him, to a nonresident or any person not falling within the jurisdiction of a local licensing authority or to an alien which resides outside the commonwealth for purposes of firearms competition and subject to such terms and conditions as said commissioner may deem proper; provided, however, that no license shall be issued to a person convicted of a felony, or convicted of the unlawful use, possession or sale of narcotic or harmful drugs. Such license shall be valid for a period of one year but the commissioner may renew said license, if in his discretion such renewal is necessary. Temporary licenses issued under this section shall be marked **"Temporary License to Carry Firearms"**, and shall not be used to purchase firearms in the commonwealth as provided for in section one hundred and thirty-one E. The fee for said license shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven. A license issued under the provisions of this section to a nonresident who is in the employ of a bank, public utility corporation, or a firm engaged in the business of transferring monies, or business of similar nature, or a firm licensed as a private detective under the provisions of chapter one hundred and forty-seven, and whose application is endorsed by his employer, or who is a member of the armed services and is stationed within the territorial boundaries of the commonwealth and has the written consent of his commanding officer, may be issued for any term not to exceed two years, and said licenses shall expire in accordance with the provisions of section one hundred and thirty-one.

A license, otherwise in accordance with provisions of this section, may be issued to a nonresident employee, whose application is endorsed by his employer, of a federally licensed Massachusetts manufacturer of machine guns to possess within the commonwealth a machine gun for the purpose of transporting or testing relative to the manufacture of machine guns, and the license shall be marked "temporary license to possess a machine gun" and may be issued for any term not to exceed two years and shall expire in accordance with the provisions of section one hundred and thirty-one.

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C. 140 § 131G Certain Nonresidents Authorized to Carry Firearms

Any person who is not a resident of the commonwealth may carry a pistol or revolver in or through the commonwealth for the purpose of taking part in a pistol or revolver competition or attending any meeting or exhibition of any organized group of firearm collectors or for the purpose of hunting; provided, that such person is a resident of the United States and has a permit or license to carry firearms issued under the laws of any state, district or territory thereof which has licensing requirements which prohibit the issuance of permits or licenses to persons who have been convicted of a felony or who have been convicted of the unlawful use, possession or sale of narcotic or harmful drugs; provided, further, that in the case of a person traveling in or through the commonwealth for the purpose of hunting, he has on his person a hunting or sporting license issued by the commonwealth or by the state of his destination. Police officers and other peace officers of any state, territory or jurisdiction within the United States duly authorized to possess firearms by the laws thereof shall, for the purposes of this section, be deemed to have a permit or license to carry firearms as described in this section.

C. 140 § 131H Permit to Possess Firearms by Aliens

No alien shall own or have in his possession or under his control a firearm except as provided in section one hundred and thirty-one F or a rifle or shotgun except as provided in this section or section one hundred and thirty-one F. The commissioner of public safety may, after an investigation, issue a permit to an alien to own or have in his possession or under his control a rifle or shotgun; subject to such terms and conditions as said commissioner may deem proper. The fee for such permit shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven. Upon issuing such permit said commissioner shall so notify, in writing, the chief of police or the board of officer having control of the police in the city or town in which such alien resides. Each such permit card shall expire at twelve midnight on December thirty-first next succeeding the effective date of said permit, and shall be revocable for cause by said commissioner. In case of revocation, the fee for such permit shall not be prorated or refunded. Whenever any such permit is revoked, said commissioner shall give notification as hereinbefore provided. The permit issued to an alien under this section shall be subject to sections one hundred and twenty-nine B and one hundred and twenty-nine C except as otherwise provided by this section.

Penalty M

Violation of any provision of this section shall be punished by a fine of not less than five hundred nor more than one thousand dollars, and by imprisonment for not more than six months in a jail or house of correction. If, in any prosecution for violation of this section, the defendant alleges that he has been naturalized, or alleges that he is a citizen of the United States, the burden of proving the same shall be upon him. Any firearm, rifle or shotgun owned by an alien or in his possession or under his control in violation of this section shall be forfeited to the commonwealth. Any such firearm, rifle or shotgun may be the subject of a search warrant as provided in chapter two hundred and seventy-six.

Power of Arrest

The director of law enforcement of the department of fisheries, wildlife and environmental law enforcement, deputy directors of enforcement, chiefs of enforcement, deputy chiefs of enforcement, environmental police officers and deputy environmental police officers, wardens as defined in section one of chapter one hundred and thirty-one and members of the state police in areas over which they have jurisdiction, and all officers qualified to serve criminal process ***shall arrest, without a warrant,*** any person found with a firearm, rifle or shotgun in his possession if they have reason to believe that he is an alien and if he does not have in his possession a valid permit as provided in this section.

C. 140 § 131I Possession of Altered License to Carry or Altered FID Card

Elements of the Statute:

1) whoever falsely makes, alters, forges or counterfeits
2) or procures or assists another to falsely make, alter, forge or counterfeit
3) a license to carry a firearm or a firearm identification card
or
1) whoever forges or without authority
2) uses the signature, facsimile of the signature
3) or validating signature stamp of the licensing authority or its designee
or
1) whoever possesses, utters, publishes as true
2) or in any way makes use of a

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3) falsely made, altered, forged or counterfeited
4) license to carry a firearm or a firearm identification card

Penalty F
Violators shall be punished by imprisonment in a state prison for not more than five years or in a jail or house of correction for not more than two years, or by a fine of not less than five hundred dollars, or both such fine and imprisonment.

C. 140 § 131J Sale or Possession of Electrical Weapons; Penalty

Elements of the Statute:
1) no person shall sell, offer for sale or possess
2) a portable device or weapon
3) from which an electrical current, impulse, wave or beam may be directed
4) which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill

Penalty M
Whoever violates the provisions of this section shall be punished by a fine of not less than five hundred nor more than one thousand dollars or by imprisonment for not less than six months nor more than two years in a jail or house of correction, or both. There is no statutory right of arrest.

C. 269 § 10 Unlawfully Carrying Dangerous Weapons; Firearms; Etc.

Unlawful Carrying Elements of the Statute:
1) whoever, except as provided or exempted by statute
2) knowingly has in his possession
3) or knowingly has under his control in a vehicle
4) a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty
5) without either:

a) being present in or on his residence or place of business; or
b) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty [license to carry]; or
c) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty [nonresidents; temporary license to carry]; or
d) having complied with the provisions of sections one hundred and twenty-nine C [possess, own, transfer, etc; exemptions]and one hundred and thirty-one G of chapter one hundred and forty [nonresidents carrying firearms]; or
e) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B

Additional Unlawful Carrying Elements of the Statute:
1) whoever knowingly has in his possession
2) or knowingly has under control in a vehicle
3) a rifle or shotgun, loaded or unloaded
4) without either:

a) being present in or on his residence or place of business; or
b) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
c) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or
d) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or
e) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or
f) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B

Penalty F
Violators shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than

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five years, or for not less than one year nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than one year, nor suspended.

Qualified License in Effect for Hunting, Target Practicing, or Employment

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

FID Required for Residence or Business

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

Dangerous Weapons Elements of the Statute:

1) whoever, except as provided by law
2) carries on his person
3) or carries on his person or under his control in a vehicle
4) stiletto
5) dagger
6) or a device or case which enables a knife with a locking blade to be drawn at a locked position
7) any ballistic knife
8) or any knife with a detachable blade capable of being propelled by any mechanism
9) dirk knife
10) any knife having a double-edged blade
11) or a switch knife
12) or any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches
13) or a slung shot
14) blowgun
15) blackjack
16) metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles
17) nunchaku
18) zoobow, also known as klackers or kung fu sticks, or any similar weapon consisting of two sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather
19) a shuriken or any similar pointed starlike object intended to injure a person when thrown
20) or any armband, made with leather which has metallic spikes, points or studs or any similar device made from any other substance
21) or a cestus or similar material weighted with metal or other substance and worn on the hand
22) or a manrikigusari or similar length of chain having weighted ends
or
1) whoever, when arrested upon a warrant for an alleged crime
2) or when arrested while committing a breach or disturbance of the public peace
3) is armed with or has on his person
4) or has on his person or under his control in a vehicle
5) a billy or other dangerous weapon other than those herein mentioned and those mentioned in paragraph (a)

Penalty F

Violators shall be punished by imprisonment for not less than two and one-half years nor more than five years in the state prison, or for not less than six months nor more than two and one-half years in a jail or house of correction, except that, if the court finds that the defendant has not been previously convicted of a felony, he may be punished by a fine of not more than fifty dollars or by imprisonment for not more than two and one-half years in a jail or house of correction.

Sawed-Off Shotgun/Machine Gun; Possessory Elements of the Statute:

1) whoever, except as provided by law
2) possesses a machine gun, as defined in section one hundred and twenty-one of chapter one hundred and forty
3) without permission under section one hundred and thirty-one of said chapter one hundred and forty
or

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1) whoever owns, possesses or carries on his person, or carries on his person or under his control in a vehicle
2) a sawed-off shotgun, as defined in said section one hundred and twenty-one of said chapter one hundred and forty
3) without being the holder of a valid license to carry firearms issued in accordance with the provisions of said section one hundred and thirty-one of said chapter one hundred and forty

Penalty F

Violators shall be punished by imprisonment in the state prison for life, or for any term of years provided that any sentence imposed under the provisions of this paragraph shall be subject to the minimum requirements of subsection (a).

Additional Elements of the Statute:

1) whoever, within this commonwealth
2) produces for sale, delivers or causes to be delivered, orders for delivery, sells or offers for sale, or fails to keep records regarding, any rifle or shotgun
3) without complying with the requirement of a serial number, as provided in section one hundred and twenty-nine B of chapter one hundred and forty

Penalty M

Violators shall for the first offense be punished by confinement in a jail or house of correction for not more than two and one-half years, or by a fine of not more than five hundred dollars. There is no statutory power of arrest.

Section 10 of chapter 269 has been amended by modifying paragraph (h). The new inserted paragraph (h) now reads as follows:

New Section for 1996: Element Breakdown of Statute

1) whoever owns, possesses or transfers possession of a
2) firearm
3) rifle
4) shotgun or
5) ammunition
6) without complying with the requirements relating to firearms identification cards as provided in section one hundred and twenty-nine C of chapter one hundred and forty

Penalty M

Violators shall be punished by imprisonment in jail or house of correction for not more than two years or by a fine of not more than five hundred dollars. A second conviction of this paragraph shall be punished by imprisonment in a jail or house of correction for not more than two years or by a fine of not more than one thousand dollars or both.

Limitation

A violation of this subsection shall not be considered a lesser included offense to a violation of subsection (a), nor shall any one prosecute as a violation of this subsection the mere possession of a firearm, rifle, or shotgun by an unlicensed person not being present in or on his residence or place of business, nor shall the court allow an attempt to so prosecute.

Power of Arrest [in presence only]

A person committing a violation of this subsection may be arrested without a warrant by any officer authorized to make arrests.

Editor's Note: The limitation written into the law will preclude the prosecution from using this subsection instead of subsection (a), the mandatory one year commitment [5 year felony], for an unlawful carrying offense.

Additional Elements of the Statute:

1) whoever knowingly fails to deliver or surrender a revoked or suspended license to carry or possess firearms or machine guns
2) issued under the provisions of section one hundred and thirty-one or one hundred and thirty-one F of chapter one hundred and forty
3) or firearm identification card, or receipt for the fee for such card
4) or a firearm, rifle, shotgun or machine gun, as provided in section one hundred and twenty-nine D of chapter one hundred and forty

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5) unless an appeal is pending

Penalty M
Violators shall be punished by imprisonment in a jail or house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars. There is no statutory right of arrest.

Proscription Against Carrying on Campus
1) whoever, not being a law enforcement officer, and notwithstanding any license obtained by him under the provisions of chapter one hundred and forty
2) carries on his person a firearm as hereinafter defined, loaded or unloaded
3) or other dangerous weapon
4) in any building or on the grounds of any elementary or secondary school, college or university
5) without the written authorization of the board or officer in charge of such elementary or secondary school, college or university

Penalty M
Violators shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. There is no statutory right of arrest.

Editor's Note: For the purpose of the above paragraph, **"firearm"** shall mean any pistol, revolver, rifle or smoothbore arm from which a shot, bullet or pellet can be discharged by whatever means. Additionally, any officer in charge of an elementary or secondary school, college or university or any faculty member or administrative officer of an elementary or secondary school, college or university failing to report violations of this paragraph shall be guilty of a misdemeanor and punished by a fine of not more than five hundred dollars. There is also no statutory right of arrest for this violation.

Massachusetts Annotations:
In **Commonwealth v. Sampson**, 383 Mass. 750 (1981), the SJC held that a flare gun is not a firearm within the meaning of c. 140 § 121. In addition, a flare gun is exempted from the FID requirements by c. 140 § 129(a).Additionally, in **Commonwealth v. Sampson**, 383 Mass. 750 (1981), the SJC stated that "the proscription against carrying applies to working firearms only." See also **Commonwealth v. Dunphy**, 377 Mass. 453 (1979).

In **Commonwealth v. Rhodes,** 389 Mass. 641 (1983), the SJC held that BB-pistols are controlled exclusively by c. 269 § 12B and not c. 269 § 10(a). It excludes "any type of air gun" from the penalties of c. 269 § 10(a). Section 12B does not regulate the possession of an air gun by an adult. An adult in possession of an air gun cannot be in violation of c. 269 § 12B.

In **Commonwealth v. Fenton**, 18 Mass. App. Ct. 537 (1984), the Court held that a .22 caliber Crosman Model 38T CO2 revolver, is not controlled by c. 269 § 10(a), but by the air gun chapter of c. 269 § 12B.

C. 269 § 10C Use of Tear Gas Cartridges or MACE to Commit Crime

Elements of the Statute:
1) whoever uses tear gas cartridges
2) or any device or instrument
3) which contains a liquid, gas, powder, or any other substance
4) designed to incapacitate
5) for the purpose of committing a crime

Penalty F
Violators shall be punished by imprisonment in the state prison for not more than seven years.

C. 269 § 11B Possessing Firearm with Removed, Defaced Serial or ID

Elements of the Statute:
1) whoever, *while in the commission or attempted commission of a felony*
2) has in his possession or under his control

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3) a firearm
4) the serial number or identification number of which has been removed, defaced, altered, obliterated or mutilated in any manner

Penalty F

Violators shall be punished by imprisonment in the state prison for not less than two and one half nor more than five years, or in a jail or house of correction for not less than six months nor more than two and one half years. Upon a conviction of a violation of this section, said firearm or other article, by the authority of the written order of the court, shall be forwarded to the commissioner of public safety, who shall cause said weapon to be destroyed.

C. 269 § 11C Removing Identification Number of Firearm

Elements of the Statute:
1) whoever, by himself or another
2) removes, defaces, alters, obliterates or mutilates in any manner
3) the serial number or identification number of a firearm
4) or in any way participates therein
or
1) whoever receives a firearm
2) with knowledge that its serial number or identification number
3) has been removed, defaced, altered, obliterated or mutilated in any manner

Penalty M

Violators shall be punished by a fine of not more than two hundred dollars or by imprisonment for not less than one month nor more than two and one half years. There is no statutory right of arrest.

Editor's Note: Possession or control of a firearm the serial number or identification number of which has been removed, defaced, altered, obliterated or mutilated in any manner shall be prima facie evidence that the person having such possession or control is guilty of a violation of this section; but such prima facie evidence may be rebutted by evidence that such person had no knowledge whatever that such number had been removed, defaced, altered, obliterated or mutilated, or by evidence that he had no guilty knowledge thereof. Upon a conviction of a violation of this section said firearm or other article shall be forwarded, by the authority of the written order of the court, to the commissioner of public safety, who shall cause said firearm or other article to be destroyed.

Power of Arrest:
There is no statutory right of arrest for this violations.

C. 269 § 12 Manufacturing Certain Dangerous Weapons

Elements of the Statute:
1) Whoever manufactures or causes to be manufactured
2) or sells or exposes for sale
3) *an instrument or weapon of the kind usually known as:*

a) a dirk knife
b) a switch knife or any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches
c) or a device or case which enables a knife with a locking blade to be drawn at a locked position
d) any ballistic knife
e) or any knife with a detachable blade capable of being propelled by any mechanism
f) slung shot
g) sling shot
h) bean blower
i) sword cane
j) pistol cane
k) bludgeon
l) blackjack

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m) nunchaku
n) zoobow, also known as klackers or kung fu sticks, or any similar weapon consisting of two sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather
o) a shuriken or any similar pointed starlike object intended to injure a person when thrown
p) or a manrikiguasari or similar length of chain having weighted ends
q) or metallic knuckles or knuckles of any other substance which could be put to the same use and with the same or similar effect as metallic knuckles

Penalty M
Violators shall be punished by a fine of not less than fifty nor more than one thousand dollars or by imprisonment for not more than six months; provided, however, that sling shots may be manufactured and sold to clubs or associations conducting sporting events where such sling shots are used. ***There is no statutory right to arrest.***

C. 269 § 12A Sale to a Minor Under Eighteen of Air Rifle or BB Gun Penalized

Elements of the Statute:
1) whoever sells to a minor under the age of eighteen
2) or whoever, not being the parent, guardian or adult teacher or instructor
3) furnishes to a minor under the age of eighteen an air rifle or so-called BB gun

Penalty M
Violators shall be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment for not more than six months. There is no statutory right of arrest.

C. 269 § 12B Possession by Minor Under Eighteen of Air Rifle or BB Gun Regulated

Elements of the Statute:
1) No minor under the age of eighteen shall have an air rifle or so-called BB gun in his possession
2) while in any place to which the public has a right of access
3) unless he is accompanied by an adult
4) ***or*** unless he is the holder of a sporting or hunting license ***and*** has on his person a permit from the chief of police of the town in which he resides granting him the right of such possession
or
1) no person shall discharge a BB shot, pellet or other object from an air rifle or so-called BB gun
2) into, from or across any street, alley, public way or railroad or railway right of way
or
1) no minor under the age of eighteen shall discharge a BB shot, pellet or other object from an air rifle or BB gun
2) unless he is accompanied by an adult or is the holder of a sporting or hunting license

Penalty M
Whoever violates this section shall be punished by a fine of not more than one hundred dollars, and the air rifle or BB gun or other weapon shall be confiscated. Upon a conviction of a violation of this section the air rifle or BB gun or other weapon shall, by the written authority of the court, be forwarded to the commissioner of public safety, who may dispose of said article in the same manner as prescribed in section ten. There is no statutory right of arrest.

C. 269 § 12D Carrying Rifle or Shotgun Loaded on Public Way Prohibited

Elements of the Statute:
1) no person shall carry on any public way
2) a rifle or shotgun
3) having shells or cartridges in either the magazine or chamber thereof
4) unless such person is engaged in hunting ***and*** is the holder of a valid license issued under sections six to nine, inclusive ***or*** section fifty-one of chapter one hundred and thirty-one

Penalty [power of arrest via statute] M
Whoever violates this section shall be punished by a fine of not less than fifty nor more than five hundred dollars, and may be arrested without a warrant. On a conviction of a violation of this section, said rifle or shotgun shall be confiscated

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by the commonwealth, and on the authority of the written order of the court shall be forwarded to the commissioner of public safety, who may dispose of the same in the manner prescribed in section ten. This section shall not apply to the operation of a shooting gallery, licensed and defined under the provisions of section fifty-six A of chapter one hundred and forty, nor to persons using the same.

C. 269 § 12E Discharging a Firearm Within 500 Feet of a Dwelling

Elements of the Statute:
1) whoever discharges
2) a firearm as defined in section one hundred and twenty-one of chapter one hundred and forty
3) a rifle or shotgun
4) within five hundred feet of a dwelling
5) or other building in use
6) except with the consent of the owner or legal occupant thereof

Penalty M
Violators shall be punished by a fine of not less than fifty nor more than one hundred dollars or by imprisonment in a jail or house of correction for not more than three months, or both. There is no statutory right of arrest. However, if the circumstances give rise to a breach of the peace, an arrest may be effected under the common law.

Editor's Note: The provisions of this section shall not apply to:
(a) the lawful defense of life and property
(b) any law enforcement officer acting in the discharge of his duties
(c) persons using underground or indoor target or test ranges with the consent of the owner or legal occupant thereof
(d) persons using outdoor skeet, trap, target or test ranges with the consent of the owner or legal occupant of the land on which the range is established
(e) persons using shooting galleries, licensed and defined under the provisions of section fifty-six A of chapter one hundred and forty; and
(f) the discharge of blank cartridges for theatrical, athletic, ceremonial, firing squad, or other purposes in accordance with section thirty-nine of chapter one hundred and forty-eight

Statutes of Interest: Motor Vehicle Law

C. 85 § 11 Speeding; Arrest Without Warrant

Elements of the Statute

1) whoever violates an ordinance or by-law
2) prohibiting persons from riding or driving at a rate of speed inconsistent with public safety or convenience

Penalty M
Violators may be **arrested without a warrant** by an officer authorized to make **arrests** and kept in custody not more than twenty-four hours, Sunday excepted; and within such time he shall be brought before a proper magistrate and proceeded against according to law.

C. 85 § 16 Driver of Vehicle at Night to Give Name to Police Officer on Request

Every person shall while driving or in charge of or occupying a vehicle during the period from one hour after sunset to one hour before sunrise, when requested by a police officer, give his true name and address.

C. 85 § 17 Penalty for Violation of § 16

Whoever violates any of the provisions of section fifteen or section sixteen shall be punished by a fine of not more than five dollars. There is no statutory power of arrest. The driver or custodian of a vehicle shall be deemed to be the party responsible therefor and shall be liable to the foregoing penalty.

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C. 89 § 1 Vehicles Meeting to Keep Right; Exceptions

Keeping to the Right of the Middle of the Roadway

When persons traveling with vehicles meet on a way, each shall seasonably drive his vehicle to the right of the middle of the traveled part of such way, so that the vehicles may pass without interference, except that the department of highways may modify such restriction by pavement markings on state highways, on ways leading thereto and on all main highways between cities and towns.

Crossing Solding Line to Enter or Exit a Private Way

The provisions of this section shall not be construed as prohibiting a vehicle from crossing a solid center pavement marking line or lines in making a left turn into or from a private way.

C. 89 § 2 Vehicle Passing in Same Direction to Keep Left; Exceptions

Keeping to the Left

Except as herein otherwise provided, the driver of a vehicle passing another vehicle traveling in the same direction shall drive a safe distance to the left of such other vehicle; and, if the way is of sufficient width for the two vehicles to pass, the driver of the leading one shall not unnecessarily obstruct the other.

Overtaken Vehicle Must Give Way

Except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on visible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle.

Passing Upon the Right Permitted

The driver of a vehicle may, if the roadway is free from obstruction and of sufficient width for two or more lines of moving vehicles, overtake and pass upon the right of another vehicle when the vehicle overtaken is:

(a) making or about to make a left turn
(b) upon a oneway street, or
(c) upon any roadway on which traffic is restricted to one direction of movement

C. 89 § 4 Vehicles to Keep to Right When View Obstructed

Keeping to the Right When View Obstructed

Whenever on any way, public or private, there is not an unobstructed view of the road for at least four hundred feet, the driver of every vehicle shall keep his vehicle on the right of the middle of the traveled part of the way, whenever it is safe and practicable so to do.[]., but, notwithstanding the foregoing provisions, every driver of a slow moving vehicle, while ascending a grade shall reasonably keep said vehicle in the extreme right-hand lane until the top of such grade has been reached.

C. 89 § 4A Driving in Single Lane on Multi-Lane Highway; Motorcycles

Divided Lanes

When any way has been divided into lanes, the driver of a vehicle shall so drive that the vehicle shall be entirely within a single lane, and he shall not move from the lane in which he is driving until he has first ascertained if such movement can be made with safety.

Motor Cycle Operation

The operators of motorcycles shall not ride abreast of more than one other motorcycle, shall ride single file when passing, and shall not pass any other motor vehicle within the same lane, except another motorcycle.

C. 89 § 4B Vehicles to Drive in Right-Hand Lane on Multi-Lane Highway

Driving to the Right

Upon all ways the driver of a vehicle shall drive in the lane nearest the right side of the way when such lane is available for travel, except when overtaking another vehicle or when preparing for a left turn. When the right lane has been con-

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structed or designated for purposes other than ordinary travel, a driver shall drive his vehicle in the lane adjacent to the right lane except when overtaking another vehicle or when preparing for a left or right turn; provided, however, that a driver may drive his vehicle in such right lane if signs have been erected by the department of highways permitting the use of such lane.

C. 89 § 7 Right of Way of Fire Engines, Patrol Vehicles, and Ambulances

The members and apparatus of a fire department while going to a fire or responding to an alarm, police patrol vehicles and ambulances, and ambulances on a call for the purpose of hospitalizing a sick or injured person shall have the right of way through any street, way, lane or alley.

Penalty M
Whoever wilfully obstructs or retards the passage of any of the foregoing in the exercise of such right shall be punished by a fine of not more than fifty dollars or imprisonment for not more than three months. There is no statutory power of arrest.

C. 89 § 7A Regulation of Vehicles Near Fires or Emergency Sites

Approach of an Emergency Vehicle
Upon the approach of any fire apparatus, police vehicle, ambulance or disaster vehicle which is going to a fire or responding to call, alarm or emergency situation, every person driving a vehicle on a way shall immediately drive said vehicle as far as possible toward the right-hand curb or side of said way and shall keep the same at a standstill until such fire apparatus, police vehicle, ambulance or disaster vehicle has passed.

Driving Over Hose
No person shall drive a vehicle over a hose of a fire department without the consent of a member of such department.

No Driving Within 300 Feet of Fire Truck or Within 800 Feet of a Fire
No person shall drive a vehicle within three hundred feet of any fire apparatus going to a fire or responding to an alarm, nor drive said vehicle, or park or leave the same unattended, within eight hundred feet of a fire or within the fire lines established by the fire department, or upon or beside any traveled way, whether public or private, leading to the scene of a fire, in such a manner as to obstruct the approach to the fire of any fire apparatus or any ambulance, safety or police vehicle, or of any vehicle bearing an official fire or police department designation.

Towing Provisions
Authorized police or fire department personnel may tow a vehicle found to be in violation of the provisions of this section or which is illegally parked or standing in a fire lane as established by the fire department, whether or not a fire is in progress, and such personnel shall not be subject to the provisions of section one hundred and twenty D of chapter two hundred and sixty-six.

No Operation Behind Police, Fire or Ambulance Vehicles for 300 Feet
No person shall operate a motor vehicle behind any such fire apparatus, ambulance, safety or police vehicle, or any vehicle bearing an official fire or police department designation which is operating with emergency systems on, for a distance of three hundred feet.

Penalty [fine]
Violation of any provision of this section shall be punished by a fine of not more than one hundred dollars. There is no power of arrest

C. 89 § 7B Regulation of Emergency Vehicles

The driver of a vehicle of a fire, police or recognized protective department and the driver of an ambulance shall be subject to the provisions of any statute, rule, regulation, ordinance or by-law relating to the operation or parking of vehicles, except that a driver of fire apparatus while going to a fire or responding to an alarm, or the driver of a vehicle of a police or recognized protective department or the driver of an ambulance, in an emergency and while in performance of a public duty or while transporting a sick or injured person to a hospital or other destination where professional medical services are available, may drive such vehicle at a speed in excess of the applicable speed limit if he exercises caution and

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due regard under the circumstances for the safety of persons and property, and may drive such vehicle through an intersection of ways contrary to any traffic signs or signals regulating traffic at such intersection if he first brings such vehicle to a full stop and then proceeds with caution and due regard for the safety of persons and property, unless otherwise directed by a police officer regulating traffic at such intersection. The driver of any such approaching emergency vehicle shall comply with the provisions of section fourteen of chapter ninety when approaching a school bus which has stopped to allow passengers to alight or board from the same, and whose red lamps are flashing.

C. 89 § 8 Right-of-Way at Intersections and Rotaries; Turns at Red Traffic Lights

When Operator on Left Must Yield to Operator on the Right

When two vehicles approach or enter an intersection of any ways, as defined in section one of chapter ninety, at approximately the same instant, the operator of the vehicle on the left shall yield the right-of-way to the vehicle on the right.

Yielding the Right of Way When Intending to Turn Left

Any operator intending to turn left, in an intersection, across the path or lane of vehicles approaching from the opposite direction shall, before turning, yield the right-of-way until such time as the left turn can be made with reasonable safety.

Yielding the Right of Way When Entering a Rotary

Any operator of a vehicle entering a rotary intersection shall yield the right-of-way to any vehicle already in the intersection. The foregoing provisions of this section shall not apply when an operator is otherwise directed by a police officer, or by a traffic regulating sign, device or signal lawfully erected and maintained in accordance with the provisions of section two of chapter eighty-five and, where so required with the written approval of the department of highways and while such approval is in effect.

Right Turn on Red

At any intersection on ways, as defined in section one of chapter ninety, in which vehicular traffic is facing a steady red indication in a traffic control signal, the driver of a vehicle which is stopped as close as practicable at the entrance to the crosswalk or the near side of the intersections or, if none, then at the entrance to the intersection in obedience to such red or stop signal, may make either (1) a right turn or (2) if on a one-way street may make a left turn to another one-way street, but shall yield the right-of-way to pedestrians and other traffic proceeding as directed by the signal at said intersection, except that a city or town, subject to section two of chapter eighty-five, by rules, orders, ordinances, or by-laws, and the department of highways on state highways or on ways at their intersections with a state highway, may prohibit any such turns against a red or stop signal at any such intersection, and such prohibition shall be effective when a sign is erected at such intersection giving notice thereof. Any person who violates the provisions of this paragraph shall be punished by a fine of not less than thirty-five dollars.

C. 89 § 9 Operation of MVs at Stop and Yield Signs;Traffic Control Devices

Designations by the State

The department of highways may designate any state highway or part thereof as a through way and may designate intersections or other roadway junctions with state highways at which vehicular traffic on one or more roadways should stop or yield and stop before entering the intersection or junction, and the department may, after notice, revoke any such designation. The department of highways on any state highway or part thereof so designated as a through way, or on any way where the department has designated, such way as intersecting or joining with a state highway, shall erect and maintain stop signs, yield signs and other traffic control devices.

Local Designation

The local authorities of a city or town authorized to enact ordinances or by-laws, or make rules, orders or regulations under the provisions of section twenty-two of chapter forty may in accordance with the provisions of section two of chapter eighty-five of the General Laws, including department approval when required, designate any way or part thereof under the control of such city or town as a through way and may designate intersections or other roadway junctions at which vehicular traffic on one or more roadways shall stop or yield and stop before entering the intersection or junction, ***and may, after notice and like department approval,*** when required, revoke any such designation. Such local authorities of a city or town having control of any way or part thereof so designated as a through way shall erect and maintain stop signs, yield signs and other traffic control devices at such designated intersections or junctions.

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Stop Sign; Operator Must Stop
Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign or a flashing red signal indication shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it. After having stopped, the driver shall yield the right of way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when such driver is moving across or within the intersection or junction of roadways.

Yield Sign; Operator Must Yield
The driver of a vehicle approaching a yield sign shall in obedience to such sign slow down to a speed reasonable for the existing conditions and, if required for safety to stop, shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection, or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it. After slowing or stopping, the driver shall yield the right of way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time such driver is moving across or within the intersection or junction of roadways; provided, however, that if such a driver is involved in a collision with a vehicle in the intersection or junction of roadways, after driving past a yield sign without stopping, such collision shall be deemed prima facie evidence of his failure to yield the right of way.

Blocking Intersection
The driver of a motor vehicle shall not cross or enter an intersection, which it is unable to proceed through, without stopping and thereby blocking vehicles from travelling in a free direction. A green light is no defense to blocking the intersection. The driver must wait another cycle of the signal light, if necessary.

For the purposes of this section the word, "vehicle", shall include a trackless trolley.

Penalty [fine]
Any person violating the provisions of this section shall be punished by a fine not to exceed fifty dollars for each offense.

C. 89 § 10 Violation of One-Way Street Regulations; Effect on Civil Liability

The violation by the operator or driver of a motor or other vehicle of any rule, regulation, ordinance or by-law limiting traffic on any specified way to traffic moving in one direction shall not, in respect to any civil liability, render such operator or driver, or such vehicle or any occupant thereof, a trespasser upon said way.

C. 89 § 11 Regulation of Vehicles Approaching Pedestrians in Marked Crosswalks

Yielding to a Pedestrian in a Crosswalk
When traffic control signals are not in place or not in operation the driver of a vehicle shall yield the right of way, slowing down or stopping if need be so to yield, to a pedestrian crossing the roadway within a crosswalk marked in accordance with standards established by the department of highways if the pedestrian is on that half of the traveled part of the way on which the vehicle is traveling or if the pedestrian approaches from the opposite half of the traveled part of the way to within five feet of that half of the traveled part of the way on which said vehicle is traveling.

No driver of a vehicle shall pass any other vehicle which has stopped at a marked crosswalk to permit a pedestrian to cross, nor shall any such operator enter a marked crosswalk until there is a sufficient space beyond the crosswalk to accommodate the vehicle he is operating notwithstanding that a traffic control signal may indicate that vehicles may proceed.

Penalty [fine]
Whoever violates any provision of this section shall be punished by a fine of not more than one hundred dollars.

C. 90 § 6C. Repossessor of MV Required to Return Number Plates

Any person who takes possession of a motor vehicle by foreclosure or subrogation of title shall return the number plates issued for such vehicle to the person in whose name such plates had been issued as owner by the end of the second

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day following the day on which such possession was taken.

Penalty [fine]

Whoever violates the provisions of this section shall be punished by a fine of not less than ten nor more than one hundred dollars.

C. 90 § 7E Red or Blue Oscillating Lights; Permit Requirement

No motor vehicle operated pursuant to section seven other than fire apparatus, ambulances, school buses, vehicles specified in section seven D used for transporting school children, and vehicles specified in section seven I shall mount or display a flashing, rotating or oscillating red light in any direction, except as herein provided; provided, however, that nothing in this section shall prohibit an official police vehicle from displaying a flashing, rotating or oscillating red light in the opposite direction in which the vehicle is proceeding or prohibit fire apparatus from displaying a flashing, rotating or oscillating blue light in the opposite direction in which the vehicle is proceeding.

Vehicles Permitted to Have Red Oscillating Lights

A vehicle owned or operated by a forest warden, deputy forest warden, a chief or deputy chief of a municipal fire department, a chaplain of a municipal fire department, a member of a fire department of a town or a call member of a fire department or a member or a call member of an emergency medical service may have mounted thereon flashing, rotating or oscillating red lights. Such lights shall only be displayed when such owner or operator is proceeding to a fire or in response to an alarm and when the official duty of such owner or operator requires him to proceed to said fire or to respond to said alarm, and at no other time.

Application for Red Light

No such red light shall be mounted or displayed on such vehicle until proper application has been made to the registrar by the head of the fire department and a written permit has been issued and delivered to the owner and operator. In the event that the operator is not the registered owner of the vehicle, no permit shall be issued until said owner forwards to the registrar a written statement certifying that he has knowledge that such red light will be mounted and displayed on said vehicle.

Permit to be Kept on Person on in the Vehicle

Any person operating a vehicle upon which flashing, rotating or oscillating red lights herein authorized are mounted shall have the permit for said lights upon his person or in the vehicle in some easily accessible place. Upon termination of the duties which warranted the issuance of the permit, the head of the fire department shall immediately notify the registrar who shall forthwith revoke such red light permit. Upon the written request of the chief of police or chief of fire of the town in which such permitted vehicle is registered, the registrar may revoke such permit. The registrar shall revoke such permit for the unauthorized use of such red lights and the owner and operator shall be subject to a fine as hereinafter provided.

Upon revocation, the registrar of motor vehicles shall notify forthwith the owner and operator of the vehicle for which such permit was issued and the head of the police department and fire department of the town in which his original permit was issued.

No motor vehicle or trailer except:

(i) a vehicle used solely for official business by any police department of the commonwealth or its political subdivisions or by any railroad police department or college or university police department whose officers are appointed as special state police officers by the colonel of state police pursuant to section sixty-three of chapter twenty-two C and subject to such special rules and regulations applicable to such college or university police department as the registrar may prescribe,
(ii) a vehicle owned and operated by a police officer of any town or any agency of the commonwealth while on official duty and when authorized by the officer's police chief or agency head and only by authority of a permit issued by the registrar,
(iii) a vehicle operated by a duly appointed medical examiner or a physician or surgeon attached to a police department of any city or town only while on official duty and only by authority of a permit issued by the registrar,
(iv) a vehicle operated by a police commissioner of a police department of any city only while on official duty and only by authority of a permit issued by the registrar,

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(v) a vehicle actually being used for the transportation of persons who are under arrest, or in lawful custody under authority of any court, or committed to penal or mental institutions, and only by authority of a permit issued by the registrar,
(vi) a vehicle operated by a chaplain of a municipal police department while on official duty and only by authority of a permit issued by the registrar shall mount or display a flashing, rotating or oscillating blue light in any direction.

Application for Blue Light

No motor vehicle, as hereinbefore provided, requiring a permit from the registrar, shall mount or display a blue light on such vehicle until proper application has been made to the registrar by the head of the police department and such written permit has been issued and delivered to the owner and operator. Such notice shall include the place of residence and address of the owner and operator of the vehicle for which such permit is issued and the name of the make, vehicle identification number and the registration number of the vehicle for which such permit authorizes the display of blue lights.

Permit to be Kept on Person on in the Vehicle

Any person operating a vehicle upon which blue lights have been authorized to be mounted or displayed, by permit, shall carry such permit for said lights upon his person or in the vehicle in some easily accessible place. Upon termination of the duties of such person which warranted the issuance of the permit, the chief of police shall immediately notify the registrar, who shall forthwith revoke such blue light permit. Upon the written request of the chief of police of the town in which such permitted vehicle is registered the registrar may revoke such permit. The registrar shall revoke such permit for the unauthorized use of such blue lights and the owner and operator shall be subject to a fine as hereinafter provided. Upon revocation, the registrar of motor vehicle shall notify forthwith the owner and operator of the vehicle for which such permit was issued and the head of the police department of the city or town in which such permitted vehicle is registered. Upon receipt of his notice of revocation, such owner and operator shall forthwith deliver such blue light permit to the registrar and he shall not be eligible for reissuance of such permit without consent of the head of the police department of the town in which his original permit was issued. Nothing in this section shall authorize any owner or operator to disregard or violate any statute, ordinance, by-law, rule or regulation regarding motor vehicles or their use on ways of the commonwealth. The registrar may also make such rules and regulations governing or prohibiting the display of such other lights on motor vehicles as he may deem necessary for public safety.

Penalty [fine]

Any person who violates any provision of this section for which a penalty is not otherwise provided shall be subject to a fine of not less than one hundred dollars, nor more than three hundred dollars.

C. 90 § 7R1/2 Placement of Seller's Insignia on Motor Vehicle; Consent of Buyer

No seller, or an agent or employee of a seller, of motor vehicles shall place on a motor vehicle an insignia, logo or other plate that advertises the name of the seller without first having obtained the written consent of the buyer of such motor vehicle. Such seller must provide a buyer with a written consent form at the time of the purchase of the motor vehicle. The original of such written consent form shall be retained by the seller and a copy retained by the buyer. Any such seller's failure to obtain written consent from the buyer shall enable the buyer to request that the seller remove any insignia, logo or plate and make all repairs necessary to restore the motor vehicle to its original condition. Each seller shall post in a conspicuous place, a notice explaining the buyer's rights under this section. Any violation of this section shall be punishable by a fine of not less than two hundred dollars.

C. 90 § 7AA Child Passenger Restraints; Mandatory Use; Exceptions

Child Five Years or Less

No child five years old or less shall ride as a passenger in a motor vehicle on any way unless said child is wearing a safety belt which is properly adjusted and fastened or unless such child is properly fastened and secured by a child passenger restraint as defined in section one.

Between Five and Twelve

No child who is older than five years of age but not older than twelve years of age shall ride as a passenger in a motor vehicle on any way unless said child is wearing a safety belt which is properly adjusted and fastened.

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The provisions of this section shall not apply to any such child who is:

(1) riding as a passenger in a motor vehicle in which all seating positions equipped with safety belts or child passenger restraints are occupied by other passengers who are using said restraints;
(2) riding as a passenger in a motor vehicle used to transport passengers for hire;
(3) riding as a passenger in a motor vehicle not equipped with safety belts;
(4) physically unable to use safety belts or child passenger restraints.

Penalty [fine]
Any operator of a motor vehicle who violates the provisions of this section shall be subject to a fine of not more than twenty-five dollars; provided, however, that such fine may be waived if the court is satisfied that the defendant has purchased a child passenger restraint as defined in section one.

Evidence Cannot Be Used in a Contributort Negligence Action
A violation of this section shall not be used as evidence of contributory negligence in any civil action.

C. 90 § 8 Licenses to Operate Motor Vehicles; Application Procedure

Application Procedures for License
Application for a license to operate motor vehicles may be made by any person except a person who has been licensed and whose license is not in force because of revocation or suspension or whose right to operate is suspended by the registrar; but before such a license is granted, the applicant shall pass such examination as to his qualifications as the registrar, without discriminating as to age, shall require; ***and no license shall be issued until the registrar or his authorized agent is satisfied that the applicant is a proper person to receive it;*** and, except as hereinafter provided, no such license shall be issued to any person under eighteen years of age. Each applicant shall submit with his application a birth, baptismal or school certificate or such other satisfactory evidence of his age as the registrar may require. Each applicant shall state his military status in such application, and the registrar shall record such status in the central computer system of the registry.

Junior Operator's License
A junior operator's license may, under rules and regulations established by the registrar, be issued to a minor under eighteen years of age who has attained age seventeen and such a license may be issued to a person under seventeen years of age if he is at least sixteen and one half years of age ***and has successfully completed a driver education and training course approved by the registrar.***

Junior Operator's License—Cannot Operate Between 1:00 a.m. and 4:00 a.m. Unless Accompanied by Parent
Such license shall not entitle a licensee under eighteen years of age to operate a motor vehicle between the hours of one o'clock ante meridian and four o'clock ante meridian unless accompanied by a parent or legal guardian.

Deemed Operating Without a License
The extent to which a holder of a junior operator's license may operate a motor vehicle thereunder shall be printed on each such license and any holder of such a license who operates a motor vehicle otherwise than as indicated on his license shall be deemed to be operating a motor vehicle without being duly licensed under this chapter.

Receipt in Lieu of License
If for any reason the registrar or his agents are unable to examine an applicant for a license promptly, the applicant may be issued a receipt for the fee paid, provided that the applicant shows that he is duly licensed in a state or country which state or country the registrar has finally determined prescribes and enforces standards of fitness for operators of motor vehicles substantially as high as those prescribed and enforced by this commonwealth. Said receipt shall be carried in lieu of the license, and for a period of sixty days from the date of its issue said receipt shall have the same force and effect given to the license by this chapter.

To each licensee shall be assigned some distinguishing number or mark, and the licenses issued shall be in such form as the registrar shall determine. They may contain special restrictions and limitations. They shall contain a photograph of the licensee, the distinguishing number or mark assigned to the licensee, his name, his place of residence and address, a brief description of him for purposes of identification, and such other information as the registrar shall deem necessary.

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The photographs of licensees appearing on all operator's licenses shall be a straightforward looking view of the licensee with a distinctive license for persons under the age at which they can purchase alcoholic beverages as defined by section thirty-four of chapter one hundred and thirty-eight.

A person to whom a license has been issued under this section shall not operate motor vehicles other than those for which such license has been made valid by the registrar. All operators of motor vehicles and trailers which are regarded as registered under a general distinguishing number or mark as provided in section five and motor vehicles and trailers owned and operated by the commonwealth or any of its political subdivisions shall be subject to the rules and regulations establishing classifications for operator's licenses. In absence of a registered gross weight for such vehicle or trailer, the gross vehicle weight rating as established by the original manufacturer of the chassis shall be used to determine the class of license required to operate the aforementioned motor vehicles and trailers.

Every person licensed to operate motor vehicles as aforesaid shall endorse his name in full in a legible manner on the margin of the license, in the space provided for the purpose, immediately upon receipt of said license, and such license shall not be valid until so endorsed.

Every person licensed to operate motor vehicles as aforesaid shall report to the registrar every change in his military status, and the registrar shall record such change in status in the central computer system of the registry.

A license or any renewal thereof issued to an operator shall expire on an anniversary of the operator's date of birth occurring more than twelve months but not more than sixty months after the effective date of such license. The license issued to an operator born on February twenty-ninth shall, for the purpose of this section, expire on March first.

Applications for licenses shall be in such form as may be prescribed by the registrar. Every application for an original license filed under this section shall be sworn to by the applicant before a justice of the peace or notary public and, if the applicant is under age eighteen, be accompanied by the written consent, in such form as the registrar shall determine, of a parent or guardian or other person standing in the place of a parent of the applicant.

An applicant for a license under this section shall be required to answer questions on the examination to determine the applicant's knowledge of the laws regarding operating a motor vehicle while under the influence of alcoholic beverages, including the relevant sections of this chapter and chapter one hundred and thirty-eight. The registrar shall determine the nature and number of such questions.

C. 90 § 8B Learner's Permit; Liability of Licensed Operator Accompanying Learner

Appicants for Learner's Permit

Any person who is at least sixteen years of age, excepting persons who have been licensed and whose licenses are not in force because of revocation or suspension, and persons whose right to operate is suspended by the registrar, may apply to the registrar for a learner's permit.

Satisfactory Age

Each applicant shall submit with his application a birth, baptismal or school certificate or such other satisfactory evidence of his age as the registrar may require.

Learner's Permit Entitlements

The registrar, in his discretion, after the applicant has successfully passed all parts of the examination other than the driving test, may issue to the applicant a learner's permit which shall entitle him, while having such permit in his immediate possession:

a) to drive a motor vehicle upon any way when accompanied by an operator
b) duly licensed by his state of residence
c) who is eighteen years of age or over
d) who has had at least one year of driving experience, and
e) who is occupying a seat beside the driver

Motorized Bicycles

In the case of a motorized bicycle, no such accompanying operator shall be required.

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No Riders; No Operation Between Sunsey and Sunrise
Additionally, if the applicant has been issued a learner's permit restricted to the operation of a motorcycle, said learner's permit shall not entitle him to carry any passenger while operating such motorcycle upon any way or to operate a motorcycle upon any way at any time after sunset or before sunrise.

No such motorcycle learner's permit which has expired shall be renewed unless the applicant successfully passes such parts of the examination other than the driving test as the registrar may require; and unless said applicant has taken at least one driving test during the period when the learner's permit was valid. If such applicant fails the driving test twice he shall be required to successfully complete a course of study at an approved rider training school as provided for in section fifteen of chapter twenty-two, prior to scheduling a subsequent driving test. Such licensed operator shall be liable for the violation of any provision of this chapter, or of any regulation made in accordance herewith, committed by such persons with a learner's permit; provided, however, that an examiner in the employ of the registrar, when engaged in his official duty, shall not be liable for the acts of any person who is being examined by said examiner. Any such learner's permit shall be valid for one year from the date of issue or until the holder shall have received a license to operate, whichever first occurs.

Learner's Permit Operation—No Operation Between 1:00 a.m. and 5:00 a.m.
If the applicant is under eighteen years of age, said learner's permit shall not entitle him to operate a motor vehicle between the hours of one o'clock ante meridian and five o'clock ante meridian, unless:

a) he is accompanied by his parent or legal guardian
b) who is a licensed operator
c) with at least one year of driving experience and
d) whose license or right to operate is not revoked or suspended

C. 90 § 8E Identification Cards for Persons Without Valid Operator's Licenses

Any person eighteen years of age or older who does not have a valid license to operate motor vehicles may make application to the registrar of motor vehicles and be issued an identification card by the registrar and attested by the registrar as to true name, correct age, photograph and other identifying data as the registrar may require. Every application for an identification card shall be signed and verified by the applicant before a person authorized to administer oaths and shall contain such bona fide documentary evidence of the age and identity of such applicant as the registrar may require. The registrar shall require payment of a fee, to be determined annually by the commissioner of administration under the provision of section three B of chapter seven at the time application for an identification card is made.

C. 90 § 8H Unlawful Use of Identification Cards

No person shall:

(a) display, cause or permit to be displayed, or have in his possession, any canceled, fictitious, fraudulently altered, or fraudulently obtained identification card;
(b) lend his identification card to any other person or knowingly permit the use thereof by another;
(c) display or represent any identification card not issued to him as being his card;
(d) permit any unlawful use of an identification card issued to him;
(e) photograph, photostat, duplicate, or in any way reproduce any identification card or facsimile thereof in such a manner that it could be mistaken for a valid identification card, or display or have in his possession any such photograph, photostat, duplicate, reproduction, or facsimile unless authorized by the provisions of this chapter.

C. 90 § 9 Operation of Unregistered or Improperly Equipped Motor Vehicles

No person shall operate, push, draw or tow any motor vehicle or trailer, and the owner or custodian of such a vehicle shall not permit the same to be operated, pushed, drawn or towed upon or to remain upon any way except as authorized by section three, ***unless such vehicle is registered*** in accordance with this chapter and carries its register number displayed as provided in section six, and, in the case of a motor vehicle, is equipped as provided in section seven.

A motor vehicle which is being towed or drawn by a motor vehicle designed to draw or tow such vehicles need not be

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so registered if :

(a) the towing vehicle is properly registered and displays a valid repair plate issued pursuant to section five
(b) said towing vehicle maintains insurance which also provides coverage for the motor vehicle being towed, and
(c) said towing vehicle has been issued a certificate by the department of public utilities pursuant to paragraph (b) of section three of chapter one hundred and fifty-nine B.

Agricultural Purposes or Industrial Purposes

A tractor, trailer or truck may be operated without such registration upon any way for a distance not exceeding one half mile, if said tractor, trailer or truck is used exclusively for agricultural purposes or between one-half mile and two miles if said tractor, trailer or truck is used exclusively for agricultural purposes and the owner or lessee of said tractor, trailer or truck has filed with the registrar of motor vehicles a liability policy or bond in compliance with the provisions of this chapter, or for a distance not exceeding three hundred yards, if such tractor, trailer or truck is used for industrial purposes other than agricultural purposes, for the purpose of going from property owned or occupied by the owner of such tractor, trailer or truck to other property so owned or occupied.

New M/V Delivered to Dealer

A new automobile being delivered to a dealer by means of a tractor and trailer may be unloaded on a public way and driven by the person so delivering or his agents or servants without such registration to a dealer's premises over a public way for a distance not exceeding three hundred feet provided that the person so delivering, with respect to such new automobile, shall have filed with the registrar a motor vehicle liability policy or bond in compliance with the provisions of this chapter.

Golf Cart

A motor vehicle designed for the carrying of golf clubs and not more than four persons may be operated without such registration upon any way if such motor vehicle is being used solely for the purpose of going from one part of the property of said golf course, provided that the owner of such motor vehicle shall have filed with the registrar a public liability policy or bond providing for the payment of damages to any person to the amount provided by section thirty-four A due to injuries sustained as a result of the operation of such vehicle.

M/V Owned by Cemetery

A motor vehicle owned by a cemetery may be operated without such registration upon any way if such motor vehicle is being used solely for the purpose of going from one part of the property of a cemetery to another part of the property of said cemetery, provided that such vehicle shall not travel more than one mile on any public way and the owner of such motor vehicle shall have filed with the registrar a public liability policy or bond providing for the payment of damages to any person to the amount provided by section thirty-four A due to injuries sustained as a result of the operation of such vehicle.

Earth-Moving Vehicle

An earth-moving vehicle used exclusively for the building, repair and maintenance of highways which exceed the dimensions or weight limits imposed by section nineteen and the weight limits imposed by section thirty of chapter eighty-five may be operated without such registration for a distance not exceeding three hundred yards on any way adjacent to any highway or toll road being constructed, relocated or improved under contract with the commonwealth or any agency or political subdivision thereof or by a public instrumentality, provided that a permit authorizing the operation of such a vehicle in excess of the stated weight or dimension limits has been issued by the commissioner of highways or the board or officer having charge of such way, and provided that such earth-moving vehicle shall be operated under such permit only when directed by an officer authorized to direct traffic at the location where such earth-moving vehicle is being operated. The operation of such an earth-moving vehicle shall conform to any terms or conditions set forth in such permit, and any person to whom any such permit is issued shall provide indemnity for his operation by means of a motor vehicle liability policy or bond conforming to the requirements of this chapter and shall furnish a certificate conforming to the requirements of section thirty-four A with each such application for a permit.

Violation of this section shall not be deemed to render the motor vehicle or trailer a nuisance or any person a trespasser upon a way and shall not constitute a defense to, or prevent a recovery in, an action of tort for injuries suffered by a person, or for the death of a person, or for damage to property, unless such violation by the person injured or killed or sustaining the damage was in fact a proximate cause of such injury, death or damage, but violation of this section shall be deemed evidence of negligence on the part of the violator.

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A motor vehicle or trailer shall be deemed to be registered in accordance with this chapter notwithstanding any mistake in so much of the description thereof contained in the application for registration or in the certificate required to be filed under section thirty-four B as relates to the type of such vehicle or trailer or to the identifying number or numbers required by the registrar or any mistake in the statement of residence of the applicant contained in said application or certificate.

Penalty M
A person convicted of a violation of this section shall be punished by a fine of not more than one hundred dollars for the first offense and not more than one thousand dollars for any subsequent offense. There is no power of arrest.

C. 90 § 10 Operation of MV Without a License

No Operation Where Under Sixteen
No person *under sixteen years of age shall operate a motor vehicle* upon any way.

Additional Violations
No other person shall so operate:

a) unless licensed by the registrar unless he possesses a receipt issued under section eight for persons licensed in another state or country or
b) unless he possesses a valid learner's permit issued under section eight B, except as is otherwise herein provided or
c) unless he is the spouse of a member of the armed forces of the United States who is accompanying such member on military or naval assignment to this commonwealth and who has a valid operator's license issued by another state, or
d) unless he is on active duty in the armed forces of the United States and has in his possession a license to operate motor vehicles issued by the state where he is domiciled, or
e) unless he is a member of the armed forces of the United States returning from active duty outside the United States, and has in his possession a license to operate motor vehicles issued by said armed forces in a foreign country, but in such case for a period of not more than ***forty-five days after his return.***

Nonresident Operation
The motor vehicle of a nonresident may be operated on the ways of the commonwealth in accordance with section three by its owner or by any nonresident operator without a license from the registrar if the nonresident operator is duly licensed under the laws of the state or country where such vehicle is registered ***and has such license on his person or in the vehicle in some easily accessible place.***

Nonresident Operation—Motor Vehicle Type
Subject to the provisions of section three, a nonresident who holds a license under the laws of the state or country in which he resides may operate any motor vehicle of a type which he is licensed to operate under said license, duly registered in this commonwealth or in any state or country; provided:

a) that he has the license on his person or in the vehicle in some easily accessible place, and
b) that, as finally determined by the registrar, his state or country grants substantially similar privileges to residents of this commonwealth and prescribes and enforces standards of fitness for operations of motor vehicles substantially as high as those prescribed and enforced by this commonwealth.

No Operation Under Suspension
Notwithstanding the foregoing provisions, no person shall operate on the ways of the commonwealth any motor vehicle, whether registered in this commonwealth or elsewhere, if the registrar shall have suspended or revoked any license to operate motor vehicles issued to him under this chapter, or shall have suspended his right to operate such vehicles, and such license or right has not been restored or a new license to operate motor vehicles has not been issued to him.

Suspension Penalty
Operation of a motor vehicle in violation of this paragraph shall be subject to the same penalties as provided in section twenty-three for operation after suspension or revocation and before restoration or issuance of a new license or the restoration of the right to operate.

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C. 90 § 11 Certificate of Registration and License to Be Carried by Operator

Registration and License Upon Person
Every person operating a motor vehicle shall have the certificate of registration for the vehicle and for the trailer, if any, and his license to operate, upon his person or in the vehicle, in some easily accessible place.

Exceptions
The certificates of registration of dealers, manufacturers, repairmen, owner-repairmen, farmers or dealers in both boats and boat trailers need not be so carried.

Exceptions—Newly Acquired Vehicle
Additionally, the certificate of registration of a person who is operating a motor vehicle in accordance with the provisions of the last sentence of the fifth paragraph of section two need not be so carried.

Exceptions—Rental [phostat copy]
Additionally, in the case of a rental vehicle, a photostat copy of the certificate of registration, accompanied by the rental agreement, shall be sufficient to comply with the provisions of this section.

RMV Receipt Carried in Lieu of License of Registration for Not More than Sixty Days
If for any reason the registrar or his agents are unable to issue promptly to an applicant the certificate of registration or the license applied for, they may issue a receipt for the fee paid, and said receipt shall be carried in lieu of the certificate or license as the case may be, and for a period of sixty days from the date of its issue said receipt shall have the same force and effect given to the certificate or license by this chapter.

Written Demand Carried in Lieu of Registration or License When Returned to RMV for Inspection [sixty days]
If, in compliance with a written demand of the registrar or any of his authorized agents, a certificate of registration or license to operate is returned for inspection or for any other purpose, except for suspension or revocation, such written demand shall be carried in lieu of the certificate or license, as the case may be, and for the period of sixty days from its date said demand shall have the same force and effect given to the certificate or license by this chapter.

Exhibing License and Registration Upon Request at Accident
Any operator who knowingly collides with or causes injury to any person or damage to any property shall, upon the request of the person injured or the person owning or in charge of the property damaged, plainly exhibit to such person his license and, if required under the provisions of this chapter to carry the certificate of registration for the vehicle upon his person or in the vehicle, such certificate.

C. 90 § 12 Employing or Allowing Unlicensed Operator to Operate Vehicle

No person shall employ for hire as an operator any person not licensed in accordance with this chapter. No person shall allow a motor vehicle owned by him or under his control to be operated by any person who has no legal right so to do, or in violation of this chapter.

C. 90 § 13 Impeded Operation

No person, when operating a motor vehicle, shall permit to be on or in the vehicle or on or about his person anything which may interfere with or impede the proper operation of the vehicle or any equipment by which the vehicle is operated or controlled, except that a person may operate a motor vehicle while using a citizens band radio or mobile telephone as long as one hand remains on the steering wheel at all times.

No person having control or charge of a motor vehicle, except a person having control or charge of a police, fire or other emergency vehicle in the course of responding to an emergency, or a person having control or charge of a motor vehicle while engaged in the delivery or acceptance of goods, wares or merchandise for which the vehicle's engine power is necessary for the loading or unloading of such goods, wares or merchandise shall allow such vehicle to stand in any way and remain unattended without stopping the engine of said vehicle, effectively setting the brakes thereof or making it fast, and locking and removing the key from the locking device and from the vehicle.

Whenever a bus having a seating capacity of more than seven passengers, a truck weighing, unloaded, more than four

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thousand pounds, or a tractor, trailer, semi-trailer or combination thereof, shall be parked on a way, on a grade sufficient to cause such vehicle to move of its own momentum, and is left unattended by the operator, one pair of adequate wheel safety chock blocks shall be securely placed against the rear wheels of such vehicle so as to prevent movement thereof. The provisions of the preceding sentence shall not apply to a vehicle equipped with positive spring-loaded air parking brakes.

No person shall drive any motor vehicle equipped with any television viewer, screen or other means of visually receiving a television broadcast which is located in the motor vehicle at any point forward of the back of the driver's seat or which is visible to the driver while operating such motor vehicle.

Whoever operates a motorcycle on the ways of the commonwealth shall ride only upon the permanent and regular seat attached thereto, and he shall not carry any other person, nor allow any other person to ride, on such motorcycle unless it is designed to carry more than one person, in which case a passenger may ride upon the permanent and regular seat if such seat is designed for two persons, or upon another seat which is intended for a passenger and is firmly attached to the motorcycle to the rear of the operator if proper foot rests are provided for the passenger's use, or upon a seat which is intended for a passenger and is firmly attached to the motorcycle in a side car.

No person shall operate a motor vehicle, commonly known as a pick-up truck, nor shall the owner permit it to be operated, for a distance more than five-miles, in excess of five miles per hour, with persons under twelve years of age in the body of such truck, unless such truck is part of an official parade, or has affixed to it a legal "Owner Repair" or "Farm" license plate or a pick-up truck engaged in farming activities.

No person, except firefighters or garbage collectors, or operators of fire trucks or garbage trucks, or employees of public utility companies, acting pursuant to and during the course of their duties, or such other persons exempted by regulation from the application of this section or by limited application by special permit granted by the selectmen in a town or of the city council in a city, shall hang onto the outside of, or the rear-end of any vehicle, and no person on a pedacycle, motorcycle, roller skates, sled, or any similar device, shall hold fast or attach the device to any moving vehicle, and no operator of a motor vehicle shall knowingly permit any person to hang onto or ride on the outside or rear-end of the vehicle or streetcar, or allow any person on a pedacycle, motorcycle, roller skates, sled, or any similar device, to hold fast or attach the device to the motor vehicle operated on any highway.

No person or persons, except firefighters acting pursuant to their official duties, shall occupy a trailer or semitrailer while such trailer or semitrailer is being towed, pushed or drawn or is otherwise in motion upon any way. No person shall operate a motor vehicle while wearing headphones, unless said headphones are used for communication in connection with controlling the course or movement of said vehicle.

C. 90 § 13A Persons in Motor Vehicles Required to Wear Safety Belts

No person shall operate a private passenger motor vehicle or ride in a private passenger motor vehicle, a vanpool vehicle or truck under eighteen thousand pounds on any way unless such person is wearing a safety belt which is properly adjusted and fastened; provided, however, *that this provision shall not apply to:*

(a) any child less than twelve years of age who is subject to the provisions of section seven AA;
(b) any person riding in a motor vehicle manufactured before July first, nineteen hundred and sixty-six;
(c) any person who is physically unable to use safety belts; provided, however, that such condition is duly certified by a physician who shall state the nature of the handicap, as well as the reasons such restraint is inappropriate; provided, further, that no such physician shall be subject to liability in any civil action for the issuance or for the failure to issue such certificate;
(d) any rural carrier of the United States Postal Service operating a motor vehicle while in the performance of his duties; provided, however, that such rural mail carrier shall be subject to department regulations regarding the use of safety belts or occupant crash protection devices;
(e) anyone involved in the operation of taxis, liveries, tractors, trucks with gross weight of eighteen thousand pounds or over, buses, and passengers of authorized emergency vehicles.

Any person who operates a motor vehicle without a safety belt, and any person sixteen years of age or over who rides as a passenger in a motor vehicle without wearing a safety belt in violation of this section, shall be subject to a fine of twenty-five dollars. Any operator of a motor vehicle shall be subject to an additional fine of twenty-five dollars for each

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person under the age of sixteen and no younger than twelve who is a passenger in said motor vehicle and not wearing a safety belt. The provisions of this section shall be enforced by law enforcement agencies only when an operator of a motor vehicle has been stopped for a violation of the motor vehicle laws or some other offense.

Any person who receives a citation for violating this section may contest such citation pursuant to section three of chapter ninety C. A violation of this section shall not be considered as a conviction of a moving violation of the motor vehicle laws for the purpose of determining surcharges on motor vehicle premiums pursuant to section one hundred and thirteen B of chapter one hundred and seventy-five.

C. 90 § 14B Uniform Signals on All Ways; Penalty.

Every person operating a motor vehicle, before stopping said vehicle or making any turning movement which would affect the operation of any other vehicle, shall give a plainly visible signal by activating the brake lights or directional lights or signal as provided on said vehicle; and in the event electrical or mechanical signals are not operating or not provided on the vehicle, a plainly visible signal by means of the hand and arm shall be made. *Hand and arm signals shall be made as follows:*

1) An intention to turn to the left shall be indicated by hand and arm extended horizontally.
2) An intention to turn to the right shall be indicated by hand and arm extended upward.
3) An intention to stop or decrease speed shall be indicated by hand and arm extended downward.

Penalty [fine]
Whoever violates any provision of this section shall be punished by a fine of not less than twenty-five dollars for each offense.

C. 90 § 16. Offensive or Illegal Operation of Motor Vehicle Prohibited

No person shall operate a motor vehicle, nor shall any owner of such vehicle permit it to be operated, in or over any way, public or private, whether laid out under authority of law or otherwise, which motor vehicles are prohibited from using, provided notice of such prohibition is conspicuously posted at the entrance to such way.

No person shall operate a motor vehicle, nor shall any owner of such vehicle permit it to be operated upon any way, except fire department and fire patrol apparatus, unless such motor vehicle is equipped with a muffler to prevent excessive or unnecessary noise, which muffler is in good working order and in constant operation, and complies with such minimum standards for construction and performance as the registrar may prescribe.

No person shall use a muffler cut-out or by-pass.

No person shall operate a motor vehicle on any way which motor vehicle is equipped (1) with a muffler from which the baffle plates, screens or other original internal parts have been removed and not replaced; or (2) with an exhaust system which has been modified in a manner which will amplify or increase the noise emitted by the exhaust.

No person operating a motor vehicle shall sound a bell, horn or other device, nor in any manner operate such motor vehicle so as to make a harsh, objectionable or unreasonable noise, nor permit to escape from such vehicle smoke or pollutants in such amounts or at such levels as may violate motor vehicle air pollution control regulations adopted under the provisions of chapter one hundred and eleven.

No siren shall be mounted upon any motor vehicle except fire apparatus, ambulances, vehicles used in official line of duty by any member of the police or fire fighting forces of the commonwealth or any agency or political subdivision thereof, and vehicles owned by call fire fighters or by persons with police powers and operated in official line of duty, unless authorized by the registrar.

No person shall use on or in connection with any motor vehicle a spot light, so called, the rays from which shine more than two feet above the road at a distance of thirty feet from the vehicle, except that such a spot light may be used for the purpose of reading signs, and as an auxiliary light in cases of necessity when the other lights required by law fail to operate.

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No person, except a duly authorized person driving an emergency fire vehicle, shall operate a motor vehicle equipped with metal studded tires upon a public way between May the first and November the first; provided, however, the registrar may authorize the use of such tires before November the first, if weather conditions require the use thereof. Whoever violates the provisions of this paragraph shall be punished by a fine of not more than fifty dollars.

C. 90 § 16A Unnecessary Operation of Engine of Stopped Motor Vehicle

No person shall cause, suffer, allow or permit the unnecessary operation of the engine of a motor vehicle while said vehicle is stopped for a foreseeable period of time in excess of five minutes.

This section shall not apply to:
(a) vehicles being serviced, provided that operation of the engine is essential to the proper repair thereof, or
(b) vehicles engaged in the delivery or acceptance of goods, wares, or merchandise for which engine assisted power is necessary and substitute alternate means cannot be made available, or
(c) vehicles engaged in an operation for which the engine power is necessary for an associate power need other than movement and substitute alternate power means cannot be made available provided that such operation does not cause or contribute to a condition of air pollution

Penalty [fine]
Whoever violates any provision of this section shall be punished by a fine of not more than one hundred dollars for the first offense, nor more than five hundred dollars for each succeeding offense.

C. 90 § 17 Speeding

No person operating a motor vehicle on any way shall run it at a rate of speed greater than is reasonable and proper, having regard to traffic and the use of the way and the safety of the public. Unless a way is otherwise posted in accordance with the provisions of section eighteen, it shall be prima facie evidence of a rate of speed greater than is reasonable and proper as aforesaid:

(1) if a motor vehicle is operated on a divided highway outside a thickly settled or business district at a rate of speed exceeding fifty miles per hour for a distance of a quarter of a mile, or
(2) on any other way outside a thickly settled or business district at a rate of speed exceeding forty miles per hour for a distance of a quarter of a mile, or
(3) inside a thickly settled or business district at a rate of speed exceeding thirty miles per hour for a distance of one-eighth of a mile, or
(4) within a school zone which may be established by a city or town as provided in section two of chapter eighty-five at a rate of speed exceeding twenty miles per hour.

Operation of a motor vehicle at a speed in excess of fifteen miles per hour within one-tenth of a mile of a vehicle used in hawking or peddling merchandise and which displays flashing amber lights shall likewise be prima facie evidence of a rate of speed greater than is reasonable and proper.

If a speed limit has been duly established upon any way, in accordance with the provisions of said section, operation of a motor vehicle at a rate of speed in excess of such limit shall be prima facie evidence that such speed is greater than is reasonable and proper; but, notwithstanding such establishment of a speed limit, every person operating a motor vehicle shall decrease the speed of the same when a special hazard exists with respect to pedestrians or other traffic, or by reason of weather or highway conditions. Except on a limited access highway, no person shall operate a school bus at a rate of speed exceeding forty miles per hour, while actually engaged in carrying school children.

C. 90 § 17B Drag Racing

No person shall operate a motor vehicle, nor shall any owner of such vehicle permit it to be operated, in a manner where the owner or operator accelerates at a high rate of speed in competition with another operator, whether or not there is an agreement to race, causing increased noise from skidding tires and amplified noise from racing engineers.

Penalty M [also suspension of operator's license by the RMV]
Whoever violates the provisions of this section shall be punished by a fine of not less than one hundred nor more than

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five hundred dollars and the registrar shall suspend such operator's license for a period of not less than thirty days. A subsequent violation shall be punished by a fine of not less than two hundred nor more than one thousand dollars and a suspension of such license for a period of not less than sixty days.

Power of Arrest
There is no statutory right of arrest. However, it will be arrestable as a breach of the preace if committed within the officer's presence or view.

C. 90 § 21 Arrest Without Warrant for Certain Violations

Elements of the Statute:
1) any officer authorized to make **arrests**
2) may **arrest without a warrant** and keep in custody for not more than twenty-four hours
3) unless a Saturday, Sunday or a legal holiday intervenes
4) any person who
5) while operating a motor vehicle on any way, as defined in section one
6) violates the provisions of the first paragraph of section ten of chapter ninety [operating without a license; **in-presence arrest**]

Editor's Note: Any **arrest** made pursuant to this paragraph shall be deemed an **arrest** for the criminal offense or offenses involved and not for any civil motor vehicle infraction arising out of the same incident.

Additional Elements of the Statute:
1) any officer authorized to make **arrests**
2) provided such officer is in uniform or conspicuously displaying his badge of office
3) may **arrest without a warrant** and keep in custody for not more than twenty-four hours
4) unless Saturday, Sunday or legal holiday intervenes
5) any person
6) regardless of whether or not such person has in his possession a license to operate motor vehicles issued by the registrar
7) if such person upon any way or in any place to which the public has the right of access, or upon any way or in any place to which members of the public have access as invitees
8) operates a motor vehicle after his license or right to operate motor vehicles in this state has been suspended or revoked by the registrar [**in-presence only**]
9) or whoever upon any way or place to which the public has the right of access, or upon any way or in any place to which members of the public have access as invitees, ***or who the officer has probable cause to believe has operated*** or is operating a motor vehicle while under the influence of intoxicating liquor, marijuana or narcotic drugs, or depressant or stimulant substances, all as defined in section one of chapter ninety-four C, or under the influence of the vapors of glue, carbon tetrachloride, acetone, ethylene, dichloride, toluene, chloroform, xylene or any combination thereof [**in-presence and in-the-past arrest**]
10) or whoever uses a motor vehicle without authority knowing that such use is unauthorized [**in-presence only**]
11) or any person who, while operating or in charge of a motor vehicle, violates the provisions of section twenty-five of chapter ninety [**in-presence only**]
12) or whoever operates a motor vehicle upon any way or in any place to which members of the public have a right of access as invitees or licensees and without stopping and making known his name, residence and the register number of his motor vehicle goes away after knowingly colliding with or otherwise causing injury to any person [**in-presence only**].

Editor's Note: Any person who is **arrested** pursuant to this section shall, at or before the expiration of the time period prescribed, be brought before the appropriate district court and proceeded against according to the law in criminal or juvenile cases, as the case may be, provided, however, that any violation otherwise cognizable as a civil infraction shall retain its character as, and be treated as, a civil infraction notwithstanding that the violator is **arrested** pursuant to this section for a criminal offense in conjunction with said civil infraction.

An investigator or examiner appointed under section twenty-nine may **arrest without a warrant**, keep in custody for a like period, bring before a magistrate and proceed against in like manner, any person operating a motor vehicle while under the influence of intoxicating liquor or marijuana, narcotic drugs, depressants or stimulant substances, all as defined

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in section one of chapter ninety-four C, irrespective of his possession of a license to operate motor vehicles issued by the registrar.

C. 90 § 23 Operating After Suspension or Revocation

Elements of the Statute:
1) whoever operates a motor vehicle
2) after having his or her license
3) revoked or suspended

Penalty M
This is a misdemeanor with a statutory right of arrest via c. 90 § 21 [in-presence only].

Editor's Note: This offense does not have to be committed on a public way. Once an operator's license is revoked or suspended, there can be no operation—anywhere. **Commonwealth v. Murphy**, 409 Mass. 665 (1991).

C. 90 § 24 Common Motor Vehicle Offenses; OUI

Elements of OUI
1) whoever operates a motor vehicle
2) upon any way or in any place to which the public has a right of access
3) or in any place to which members of the public have a right of access as invitees or licensees
4) under the influence of intoxicating liquor, marijuana, narcotic drugs or vapors of glue

Penalty M or F
This is a misdemeanor which carries a statutory right of arrest ***[in the past on probable cause]*** via c. 90 § 21. A defendant's 3rd OUI within 10 years will amounot to a 5 year felony.

Editor's Note: The usual disposition for first time violators is found in c. 90 § 24D, which calls for a 45-90 day loss of license. However, license loss will be 210 days if the defendant is under 21 years of age and attends the alcohol treatment rehabilitation program.

C. 90 § 24 Common Motor Vehicle Offenses—Endangering, Leaving the Scene, etc.

Elements of Reckless and Negligent Operation
1) whoever upon any way or in any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees
2) operates a motor vehicle recklessly
3) or operates such a vehicle negligently
4) so that the lives or safety of the public might be endangered

Penalty M
Misdemeanor with no power of arrest. However, depending on the circumstances of the event, it may rise to a breach of the peace triggering an arrest under the common law if viewed by a law enforcement officer with sworn powers of arrest.

Editor's Note: The crime of reckless operation is separate and distinct from that of operating so as to endanger. Although endangering requires mere negligence, the crime of operating recklessly requires intentional conduct involving a high degree of likelihood that substantial harm will result to another person or property. **Commonwealth v. DeSimone**, 349 Mass. 770 (1965).

Massachusetts Annotations:
In **Commonwealth v. Guillemette**, 243 Mass. 346 (1923), the Court held that convictions for reckless operation and endangering were not inconsistent with each other. Each requires different elements of proof.

It is necessary to prove intent consisting of an active state of mind amounting to reckless and wanton disregard of the lives of others for reckless operation. **Commonwealth v. Peach**, 239 Mass. 575 (1921).

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Elements of Racing [editor's note: see new change on drag racing at c. 90 § 17B]
1) whoever upon any way or in any place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees
2) operates a motor vehicle upon a bet or wager or in a race
3) or whoever operates a motor vehicle for the purpose of making a record and thereby violates any provision of section seventeen or any regulation under section eighteen

Penalty M
Misdemeanor with no power of arrest. However, depending on the circumstances of the event, it may rise to a breach of the peace triggering an arrest under the common law if viewed by a law enforcement officer with sworn powers of arrest.

Leaving the Scene After Property Damage
1) whoever without stopping and making known his name, residence and the register number of his motor vehicle
2) goes away after
3) knowingly colliding with or otherwise causing injury to any other vehicle or property

Penalty M
Misdemeanor with no power of arrest. However, depending on the circumstances of the event, it may rise to a breach of the peace triggering an arrest under the common law if viewed by a law enforcement officer with sworn powers of arrest.

Massachusetts Annotation:
In **Commonwealth v. Robbins**, 414 Mass. 444 (1993), the Court held that a person may be convicted of leaving the scene of an accident even though they are faultless in the accident itself.

Defendant Must Be Moving
In **Commonwealth v. Bleakney**, 278 Mass. 198 (1932), the Court stated that "[b]ut the words of the statute are not to be construed so as to make a defendant liable to the penalty imposes by the statute, merely because he was involved in a collision and went away without stopping and making known his name, residence and the number of his motor vehicle. It was not intended to punish the driver of a motor vehicle against which, while it is stopped in traffic, another person thoughtlessly or carelessly falls or walks where the position of such motor vehicle is a mere condition and not a cause of the collision. The words [of the statute] are 'knowing colliding.' As we interpret them, they mean that the defendant was in some way the actor, not a mere passive participant in a collision, but to some extent causing the collision or actively colliding."

Loaning License
1) whoever loans
2) or knowingly permits
3) his license
4) or learner's permit to operate motor vehicles
5) to be used by any person

Penalty M
Misdemeanor with no power of arrest.

False Statement in License Application
1) whoever makes false statements
2) in an application for a license or learner's permit
or
1) whoever knowingly makes any false statement
2) in an application for registration of a motor vehicle

Penalty M
Misdemeanor with no power of arrest.

Unlawful Taking and Using of a Motor Vehicle

1) whoever uses a motor vehicle

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2) without authority
3) knowing that such use is unauthorized

Penalty M or F

Violators shall, for the first offense be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment for not less than thirty days nor more than two years, or both, and for a second offense by imprisonment in the state prison for not more than five years.

Massachusetts Annotation:

In Commonwealth v. Giannino, 371 Mass. 700 (1977), the term "use" may include a passenger within the vehicle. However, the government must prove that the use of knowingly unauthorized.

Power of Arrest

There is a statutory right of arrest under c. 90 § 21.

Leaving the Scene After Causing Personal Injury

1) Whoever operates a motor vehicle upon any way or in any place to which the public has right of access, or upon any way or in any place to which members of the public shall have access as invitees or licensees
2) and without stopping and making known his name, residence and the registration number of his motor vehicle
3) goes away after
4) knowingly colliding with or otherwise causing injury to any person not resulting in the death of any person

Penalty M

Violators shall be punished by imprisonment for not less than six months nor more than two years and by a fine of not less than five hundred dollars nor more than one thousand dollars. There is a statutory right of arrest under c. 90 § 21 [in-presence only].

Leaving the Scene Death Resulting [without stopping and making known name, etc.]

1) whoever operates a motor vehicle upon any way or in any place to which the public has a right of access or upon any way or in any place to which members of the public shall have access as invitees or licensees
2) and without stopping and making known his name, residence and the registration number of his motor vehicle
3) goes away
4) to avoid prosecution
5) or evade apprehension
6) after knowingly colliding with or otherwise causing injury to any person causing death

Penalty F

Violators shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than ten years and by a fine of not less than one thousand dollars nor more than five thousand dollars or by imprisonment in a jail or house of correction for not less than one year nor more than two and one-half years and by a fine of not less than one thousand dollars nor more than five thousand dollars.

C. 90 § 24B Stealing, Altering, Forging, Counterfeiting License, Registration, etc.

Elements of the Statute

1) whoever falsely makes, steal, alters, forges or counterfeits or procures
2) or assists another to falsely make, steal, alter, forge or counterfeit
3) a learner's permit
4) a license to operate motor vehicles
5) an identification card issued under section eight E
6) a certificate of registration of a motor vehicle or trailer
7) or an inspection sticker

or

1) whoever forges or without authority uses
2) the signature, facsimile of the signature, or validating signature stamp of the registrar or deputy registrar
3) upon a genuine, stolen or falsely made, altered, forged or counterfeited
4) learner's permit

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5) license to operate motor vehicles
6) certificate of registration of a motor vehicle or trailer
7) or inspection sticker
or
1) whoever has in his possession, or utters, publishes as true or in any way makes use of a
2) falsely made, stolen, altered, forged or counterfeited
3) learner's permit
4) license to operate motor vehicles
5) an identification card issued under section eight E
6) certificate of registration of a motor vehicle or trailer
7) or inspection sticker
or
1) whoever has in his possession, or utters, publishes as true, or in any way makes use of
2) a falsely made, or validating signature stamp of the registrar or deputy registrar

Penalty F
Violators shall be punished by a fine of not more than five hundred dollars or by imprisonment in the state prison for not more than five years or in jail or house of correction for not more than two years.

Additional Elements of the Statute:
1) whoever
2) falsely impersonates
3) the person named in an application for a license or learner's permit to operate motor vehicles
or
1) whoever
2) procures or assists another to
3) falsely impersonate the person named in such an application
4) whether of himself or another
5) or uses a name other than his own to falsely obtain such a license
or
1) whoever has in his possession, or utters, publishes as true, or in any way makes use of a
2) license or learner's permit to operate motor vehicles that was obtained in such a manner

Penalty F
Violators shall be punished by a fine of not more than five hundred dollars or by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two years.

C. 90 § 24G Motor Vehicle Homicide While Under the Influence of an Intoxicating Substance [felony]

1) whoever upon any way or in a place to which the public has a right to access, or
2) upon any way or in any place to which members of the public have access as invitees or licenses
3) while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants, or stimulant substances, all as defined in G.L. c. 94C, § 1, or the vapors of glue
4) operates
5) motor vehicle
6) recklessly or negligently
7) lives and safety of the public might be endangered
8) by such operation causes the death of another person

Penalty F
This is a fifteen (15) felony.

C. 90 § 24G Motor Vehicle Homicide [misdemeanors]

Elements of the Statute

1) whoever upon any way or in any place to which the public has a right of access, or

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2) upon any way or in any place to which members of the public have access as invitees or licenses
3) operates
4) motor vehicle
5) while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants, or stimulant substances, all as defined in G.L. c. 94C, § 1, or the vapors of glue
6) by such operation causes the death of another person
or
1) whoever upon any way or in any place to which the public has a right of access, or
2) upon any way or in any place to which members of the public have access as invitees or licenses
3) operates
4) motor vehicle
5) recklessly or negligently
6) lives or safety or the public might be endangered and
7) by such operation causes the death of another person

Penalty M
This is a 2 1/2 year misdemeanor ***with no statutory right of arrest.***

Editor's Note: Just because the operator is intoxicated and causes the death of another person does not automatically make it a felony. What is required is the additional element of negligent or reckless operation in addition to the OUI.

C. 90 § 24L Serious Bodily Injury by MV While Under the Influence of an Intoxicating Substance [felony]

1) whoever upon any way or in a place to which the public has a right to access, or
2) upon any way or in any place to which members of the public have access as invitees or licenses
3) while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants, or stimulant substances, all as defined in G.L. c. 94C, § 1, or the vapors of glue
4) operates
5) motor vehicle
6) recklessly or negligently
7) lives and safety of the public might be endangered
8) by such operation causes serious bodily injury

Penalty F
This is a ten (10) felony.

C. 90 § 24L Serious Bodily Injury by Motor Vehicle [misdemeanor]

Elements of the Statute

1) whoever upon any way or in any place to which the public has a right of access, or
2) upon any way or in any place to which members of the public have access as invitees or licenses
3) operates
4) motor vehicle
5) while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants, or stimulant substances, all as defined in G.L. c. 94C, § 1, or the vapors of glue
6) by such operation causes serious bodily injury

Penalty M
This is a 2 1/2 year misdemeanor ***with no statutory right of arrest.***

Editor's Note: Serious bodily injury is defined by c. 90 § 24L(3) as "bodily injury which creates a substantial risk of death or which involves either total disability or the loss or substantial impairment of some bodily function for a substantial period of time."

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C. 90 § 25 Refusal to Obey Police Officer

Elements of the Statute:
1) any person who
2) while operating or in charge of a motor vehicle
3) shall refuse
4) when requested by a police officer
5) to give his name and address *or* the name and address of the owner of such motor vehicle
6) or who shall give a false name or address
7) or who shall refuse or neglect to stop when signalled to stop by any police officer who is in uniform or who displays his badge conspicuously on the outside of his outer coat or garment
or
1) who refuses, on demand of such officer
2) to produce his license to operate such vehicle or his certificate of registration
3) or to permit such officer to take the license or certificate in hand for the purpose of examination
or
1) who refuses, on demand of such officer
2) to sign his name in the presence of such officer
3) and any person who on the demand of an officer of the police or other officer mentioned in section twenty-nine or authorized by the registrar
4) without a reasonable excuse fails to deliver his license to operate motor vehicles or the certificate of registration of any motor vehicle operated or owned by him or the number plates furnished by the registrar for said motor vehicle
5) or who refuses or neglects to produce his license when requested by a court or trial justice

Penalty M
Violators shall be punished by a fine of one hundred dollars. **Editor's Note:** The above provisions in c. 90 § 25 are all arrestable via c. 90 § 21.

C. 90 § 34J Penalty for Operating Motor Vehicle Without Insurance

Elements of the Statute
1) whoever operates or permits to be operated
2) or permits to remain on a public or private way
3) a motor vehicle which is subject to the provisions of section one A
4) during such time as the motor vehicle liability policy or bond or deposit required by the provisions of this chapter has not been provided and maintained in accordance therewith

Penalty M—Violators shall be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not more than one year in a house of correction, or both such fine and imprisonment; provided, however, that any municipality that enforces the provisions of this section shall retain such fine. This section shall not apply to a person who operates a motor vehicle leased under any system referred to in section thirty-two C without knowledge that the lessor thereof has not complied with the provisions of section thirty-two E relative to providing indemnity, protection or security for property damage.

Certified Copy of the RMV
In proceedings under this section, written certification by the registrar of motor vehicles that the registry of motor vehicles has no record of a motor vehicle liability policy or bond or deposit in effect at the time of the alleged offense as required by the provisions of this chapter for the motor vehicle alleged to have been operated in violation of this section, shall be admissible as evidence in any court of the commonwealth and shall raise a rebuttable presumption that no such motor vehicle liability policy or bond or deposit was in effect for said vehicle at the time of the alleged offense. Such presumption may be rebutted and overcome by evidence that a motor vehicle liability policy or bond or deposit was in effect for such vehicle at the time of the alleged offense.

Penalty [fine]—Any person who is convicted of, or who enters a plea of guilty to a violation of this section shall be liable to the plan organized pursuant to section one hundred and thirteen H of chapter one hundred and seventy-five in the amount of the greater of five hundred dollars or one year's premium for compulsory motor vehicle insurance for the highest rated territory and class or risk in effect at the time of the commission of the offense. Said liability shall be in

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addition to all other liabilities imposed on the person so convicted or so pleading whether civil or criminal. The said plan shall apply any sums collected hereunder, to defray its costs of collection and to defray in whole or in part its expenses for preventing fraud and arson.

License Suspension

Furthermore, any person who is convicted of, or enters a plea of guilty to a violation of this section shall have his or her license or right to operate a motor vehicle suspended for sixty days by the registrar of motor vehicles upon the registrar's receipt of notification from the clerk of any court which enters any conviction hereunder or which accepts such plea of guilty. The clerk of any court which enters any conviction hereunder or which accepts such plea shall promptly notify the registrar of motor vehicles and the Commonwealth Auto Reinsurers pursuant to section one hundred and thirteen of chapter one hundred and seventy-five or any successor thereto of such entry of acceptance of such plea.

Licenser Suspension; Second or Subsequent Offense

For any second or subsequent said conviction or plea of guilty within a six year period the offender's license or right to operate a motor vehicle shall be suspended for one year by the registrar upon the registrar's receipt of such notification by the clerk of any such court.

C. 90D § 32 Motor Vehicle Title Violations; Penalties

Elements of the Statute:

1) whoever falsely makes, alters, forges, or counterfeits
2) a certificate of title or salvage title
3) or alters or forges an assignment of a certificate of title or salvage title
4) or supporting documents
5) or an assignment
6) or release of a security interest
7) on a certificate of title or a form the registrar prescribes

or

1) whoever
2) has possession of or uses a
3) certificate of title or salvage title
4) knowing it to have been altered, forged, or counterfeited

or

1) whoever
2) uses a false or fictitious name or address
3) or makes a material false statement or fails to disclose a security interest
4) or conceals any other material fact
5) in an application for a certificate of title or salvage title
6) or supporting documents

Penalty F—Violators shall be punished by a fine of not more than one thousand dollars or by imprisonment in the state prison for not more than five years, or in a jail or house of correction for not more than two years, or both.

Additional Elements

1) whoever permits another not entitled thereto
2) to use or have possession of a certificate of title or salvage title
3) or fails to mail or deliver a certificate of title, salvage title or application therefor
4) to the registrar within ten days after the time required by this chapter

or

1) whoever fails to deliver to the transferee
2) or the registrar
3) a certificate of title or salvage title within ten days after the time required by this chapter

or

1) whoever violates any other provision of the chapter, except as provided for in paragraph (a)

Penalty M—Violators shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars or by imprisonment in a jail or house of correction for not more than six months, or both.

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Police Interrogation/Identification Contextual Analysis

Disseminated
In Conjunction with the
Massachusetts Criminal Justice Training Council
for 1996 state-wide in-service training

Custody	Custody and/or Arrest	Continued Police Custody	Arraignment Post-Indictment Formally Charged	No Custody

5th Amendment Context [*Miranda* Requirement]

Miranda Warnings

1) Right to Remain Silent
2) Statements Can be Used
3) Right to Counsel
4) Appointment of Counsel

Police must be able to differentiate between these two rights, *if they are invoked by the suspect*

Invocation of Right to Remain Silent

i. reinterrogation permissible on any subject matter if:
a) honor right to cut off questioning;
b) there is a significant break; and
c) fresh set of warnings with waiver

Invocation of Right to Counsel

i. reinterrogation not permissible at all while subject is in police custody, *unless the defendant initiates*

2 Prongs of Miranda

1) Custody, and
2) Questioning

Editor's Note: The interrogation, to require Miranda, must concern testimonial or communicative evidence and NOT physical evidence. If the questioning concerns physical evidence, then Miranda will not be required. Example: Breath testing, photos, line-ups, bring-backs, field IDs, writing exemplars, voice exemplars, and blood testing.

6th Amd Context

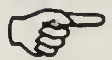
Interrogations—
Auto Attachment
Offense-specific, therefore, police can question on any other crime, notwithstanding any earlier invocations made by the defendant. No Custody Required; Automatically insulated from any police interference.

Identifications—
Auto Attachment to all corporeal IDs.
Offense-specific, just as above.
No Custody Required; Automatically insulated from any police interference.

*Non-corporeal IDs do not receive 6th Amd. protection, e.g. photo IDs.

14th Amd. [Due Process; Voluntariness]:Inculpatory statements that are a product of coercion and duress

will be suppressed as a violation of "due process"; the "human practice rule"



Disseminated
in Conjunction with the
Massachusetts Criminal Justice
Training Council
July/August 1996

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Search and Seizure Chart—1996/97

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Is there a reasonable expectation of privacy in the area controlled by the defendant?
If so—what standard of evidence is required to lawfully intrude for investigative purposes?

4 Types of Police Intrusions & 4th AMD Requirements

non-seizure **Encounter**	seizure **Stop**	seizure **Frisk**	seizure **Evidentiary**
A police officer does not need any reasonable suspicion at all to approach a person and engage them in a conversation; the person will be free to walk away if they desire; they speak to police and expose themselves at their own peril.	Reason suspicion based on specific and articulable facts that suspect has, is, or is about to commit a crime. This will empower police to effect a stop, or investigative detention, or threshold inquiry, *but not necessarily a frisk*	Reasonable suspicion based on specific and articulable facts to believe that the suspect is unlawfully armed <u>OR</u> where the officer is in immediate proximity of a person reasonably believed to be armed and dangerous; *the scope is strictly limited to weapons or objects that can be used as such*	Probable Cause *Then Require Either:* 1) Warrant 2) Consent 3) Exigent Circumstances Emergency circumstances do not require probable cause.